HISTORY AND LAW
OF
THE HAYES-TILDEN CONTEST
BEFORE THE ELECTORAL COMMISSION
THE FLORIDA CASE

ELBERT WILLIAM R. EWING.

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Before The Electoral Commission

The Florida Case 1876-77

By ELBERT WILLIAM R. EWING, LL. B.
Attorney and Counsellor of the Supreme Court of the United States
Author of
"Legal and Historical Status of the Dred Scott Decision"
and "Northern Rebellion and Southern Secession"

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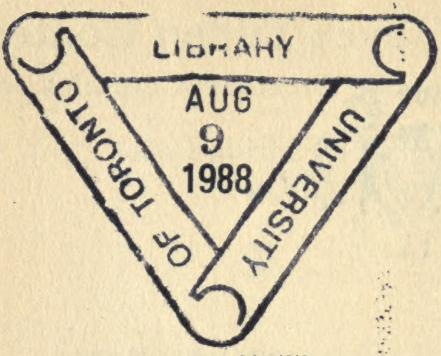

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Preface.

To follow the fortunes, studying the manœuvres, of legal battle between the greatest leaders of the American bar, is of itself an exercise of much delight. When the occasion and the opportunity for the struggle furnish a study of pre-eminent historical value, revealing questions eminently practical to the citizen who would deal intelligently with affairs of government, as well as to the statesman and to the lawyer, the importance of the subject cannot be overestimated. The Hayes-Tilden controversy over the Presidency of the United States for the term beginning March 4, 1877, gave rise to a tribunal known as the Electoral Commission; and when this court came to pass upon the disputed questions affecting the succession, the fierce legal battle which ensued and the treatment of the questions before it by the Commission, furnish an unique chapter thus replete with interest, practical value and human nature.

Advocating the cause of Tilden towered Charles O'Conor, in his day without a peer at the bar of this country—perhaps without an equal abroad. Associated with him were Jeremiah S. Black, once Attorney-General of the United States, learned, skilful and widely known; Lyman Trumbull, long a Republican Senator and an intimate personal friend of Lincoln; Montgomery Blair, an able lawyer and who had been of counsel in the famous Dred Scott Case; the astute Ashbel Green; the distinguished Richard T. Merrick; ex-Judge John A. Campbell, one of the justices who concurred with Chief Justice Taney in the Dred Scott decision, and who wrote several important opinions

while on the Supreme Bench; George Hoadley, and William C. Whitney.

For Hayes in the place of first command appeared the wrinkled, thin face, belying the powerful brain, of William M. Evarts, who had been of counsel for Andrew Johnson in his historic impeachment trial, still more famous since his able connection with the Alabama Case, and fresh from masterful achievements in the Beecher trial. Aligned with him were Stanley Matthews, shortly to be elevated to the Supreme Bench of the United States; Edward M. Stoughton, shrewd and masterful; and Samuel Shellabarger, Mr. Hayes' personal counsel—all of both sides men of learning, consummate skill and wide experience, Whitney then the least known of the number.

The Electoral Commission held its public sessions in the present court room of the United States Supreme Court. Formerly the old Senate chamber, this historical old room in the Capitol in Washington, the scene of many brilliant and profound debates, some notable hearings and the pilot house from which this government has been guided in a degree unequalled from any other source, has been the scene of no case more interesting and none of greater importance to popular government than was that heard by the fifteen distinguished men composing this Commission. Created, January 29, 1877, under peculiar conditions by an act of Congress supported by Democrats and Republicans, carried in the face of an obstinate fight led by giants of both parties, the Commission by vote of the eight Republicans to the seven Democrats, before the fourth of the following March, rendered a decision involving

the most vital questions that can arise in the election of President of the United States.

Americans entertain different views of the value of that famous decision and of the nature of the title resting thereon. Though Hayes' "moral title to the Presidency was always questioned, his legal title was perfect," says Doctor James Ford Rhodes in his recent study of the great controversy. Doctor Rhodes is an eminent and most widely-followed representative of a large class. A similar and representative view is advanced by a correspondent in *The Nation* on March 3, 1881, when he says that the action of the Commission "could not do more than make it decent for" Mr. Hayes to accept the Presidency.

Many others believe that the defect in the Hayes title was *both moral and legal.* These believe that the decision of the majority of the Commission is a blot upon American history—indelible—to be studied that its repetition may be avoided. The Commission, by the express terms of the law creating it and by its own admission, was not a tribunal of last resort, and could render no authoritative announcement of the law; it was to proceed to consider the questions submitted to it "with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together, and, by a majority of votes, decide whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons are duly appointed electors in such State, and may therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration." With-

out power or any right to give an authoritative construction either of the law or of the Constitution, it could only measure the facts before it by the *settled law;* the *existing law,* the law as it was at the date of the passage of the bill, constitutional, statutory, the old common law preserved to the States, as admittedly understood or announced by courts of competent jurisdiction being of last resort. So this second class holds that these gave the Commission well-defined *vires*; and that it may be indisputably established that the decision of the Commission passed beyond these limits, and that its pronunciamentoes became as illegal as are those of any person or any tribunal doing acts *ultra vires.*

There is, too, a small third class, steadily growing less as the light of research follows in the wake of the departing party passion and prejudice, who believe that Mr. Hayes enjoyed a title without either moral or legal blemish.

My purpose in writing has been to aid to a clearer view of the historical facts and to assist to the most intelligent grasp of the law, that the powers of the Commission may be understood, enabling the general student to appreciate the merits of the respective views. This monograph aims to gather all the material facts bearing upon the questions before the Commission, so that with a study of the law of the case, the student may form an intelligent opinion, enjoying the play of ability of the great lawyers, and get a clearer view of the practical questions, both of law and of government.

The facts have been carefully and laboriously gathered from the thousands of pages of government publications covering the story of the great controversy. No original source has been left unexplored. In stating

the law I have endeavored to give a correct annunciation of *the law*. I have studiously avoided writing as a lawyer would in preparing his brief; I have meant rather to be judicial, that the settled and undisputed rules of law might at all times be presented.

The legal questions are much the same in each case submitted to the Commission. These questions in any one case comprehended, those which arose in the others are understood. I have selected the Florida Case for testing the legal title of President Hayes, and for an examination of the principles announced as the basis of the decision by the Commission, because the Republican contribution of Florida to Hayes' vote, making possible his success without actual resort to force, presents, of all the ugly record of the disputed Southern States, less moral depravity, thus leaving the mind freer to study upon their merits the questions of law and of government.

I.

The Candidates—The Election—Subsequent Conditions.

FIFTEEN most strenuous years are those from Appomattox to 1880. No other span of time of anything like similar length since the first firm footing of the American people on the banks of the famous old James, furnishes a more thrilling chapter. In no other period of American history, whatever its length, do types of our manhood appear in stronger contrasts or principles of government stand in bolder relief. The most malicious vindictiveness, volcanic in power and of seismic destructiveness, dangerously menaced constitutional government; statesmanship waned under the rule of the demagogue; morality in high places scorched its ermine in the fires of unholy ambition; citizenship was besmirched; and a great people writhed beneath humiliating conditions imposed by irresistible power,—its bayonets fixed and brandishing the sword.

Yet hope in ultimate justice kept the right strong for the battle; at last democratic government triumphed and usurpations became history. All the time the onward sweep of the private life of the entire people was little retarded; literature flourished, art made possible a sweeter life and added to the greatness of a remarkably wonderful people. In that section of the people most affected by the evil, material prosperity, widespread and generous, rewarded the brave efforts of its invincibles and added strength for the civil battle,

until out of the ruin and out of the blackness of the antecedent years this vital section gradually lifted itself into conditions of prosperity and of domestic peace such as it had not known for more than one hundred years.

In the thrilling story of this wonderful era, two events hold the student and teach him more than all the others. Full of significance, rich in varied interests, their story is well worth its time. These are the Presidential election of 1876, and the electoral count of 1877.

To understand the great opportunity for the confusion and bitter conflicts which followed this election, giving rise to the count, we must bear in mind that then, as now, in America the voters do not directly choose a President and a Vice-President. The States, by organic constitutional law, were left to act as political individuals, as sovereign and for many purposes independent units. The predominant conception of our forefathers was that the *States* should choose a common ruler, and not that a great National Unit should choose its President. However much ideas with reference to this act may have changed, the method of its performance to this day remains. Not the majority of the popular vote, but State-majority determines who shall be the President and the Vice-President of the United States. Not even the qualified suffragists constitute the basis for the power that any State is to exercise in choosing our President. When the States adopted the Federal Constitution, it was agreed in section three of article one that the number of representatives to which each State should be entitled in "a Congress of the United States" should "be deter-

mined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." "Three-fifths of all other persons" had especial reference to the negro slaves which at that time existed by local laws in all of the States. The number of representatives could not be in excess of one for every thirty thousand, but whatever its population each State was to have at least one. Art. II. created the executive power and vested it in a President. Paragraphs two and three provide for the manner in which the executive shall be chosen. "Each State shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." "The Electors shall meet in their respective States, and vote by ballot for two persons." "And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign, certify and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such a number be a majority of the whole number of electors appointed." The person having the next highest number was to be the Vice-President. In case two or more persons had equal numbers, or lacked the required majority, the choice of a President fell to the House of Representatives; and similarly if no Vice-President should be chosen, that election fell to

the Senate. Congress was given power to determine the time of "choosing the electors, and the day on which they shall give their votes."

Article XII. of the amendments changed the procedure to the extent only that the electors are now required to vote by ballot for a President and a Vice-President; the ballots are to be distinct and distinct lists are to be made, signed, certified, and as previously to be sent sealed to the president of the Senate, who shall, "in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." Article XIV. of the amendments has changed the basis of representation in Congress, and hence the number of electors to which each State shall be entitled, so that at this time "representatives shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, excluding the Indians not taxed."

Again, it is both interesting and important to remember that when the electors of any State have convened for the purpose of voting, each man exercises his own independent right of choice. He may cast his vote for any one who meets his approval. Legally he is not obliged to vote for the ticket which is the choice of the majority that elected him. He may be nominated and elected as a Republican elector, and yet cast his vote for a Democratic candidate. But electors regard themselves as under moral obligations to support the ticket with which they are known to be in accord at the time of the general election. So it is that the choice of electors at the ballot confers upon them the power to choose the President and the Vice-President, with simply a request to exercise that power for the purpose

of selecting certain men now previously named by party leaders in national conventions. Electors have such a high regard for that request on the part of the popular voters, that as soon as it is known who have been chosen electors in any State, it is known with moral certainty for whom the electoral vote of that State will be cast when the electoral college, as the meeting of the electoral body is sometimes called, shall convene and shall vote.

The State may appoint electors in such manner as she pleases. For many years the electors were chosen by the legislature in several States; in some the choice is by districts at popular elections; and generally now the choice is by popular election by the voters of the whole State. Whatever manner any State prescribes, is yet entirely legal and can not be questioned by the Federal Government or any branch thereof.

Where the choice is by popular suffrage, as was true in Florida at the November election, 1876, the local procedure is as follows:

First, the people vote at various places in the counties. At sunset on election day the precinct polls, as these voting places are called, are closed. The precinct officers count the votes, certify the result and forward that certificate together with the ballots of each precinct to the county seat. When all the precincts of the county are in, a county canvassing board certifies the total result shown by all the precinct reports. This certificate is then sent to the seat of State government, and the ballots themselves are filed at the seat of the county. At the seat of State government a State canvassing board sums up all the county reports, declares the result as shown by the returns before it.

and issues certificates accordingly. The details thus far are all left to State laws,—such as, who and how many shall constitute the precinct election officers; who shall be permitted to vote and under what conditions; who shall constitute the county canvassing board, the State canvassing board, and the manner in which each shall perform its duties. The Federal law does no more than prescribe the day upon which the general election shall be held, the day upon which those who have been chosen electors for each respective State shall vote, the manner in which they shall certify the result of *their* voting, and that three copies of their certificates shall be made, two of which are sent to the seat of the Federal government, one by post, the other by private messenger, addressed to the president of the Senate, and that the other be sent to the Federal judge of the circuit within which they meet.

In selecting a successor to President Grant the contest between the two great parties at the November election of 1876, became most bitter. The Republican party, an organization whose forces had been drawn from those commercially and socially opposed to the emigration of the negro, bond, or free, from the South, posing as anti-slavery but who were really anti-negro, went to the fight with a brilliant war record, and under the prestige of official power. At its national convention on June 16, 1876, it placed its standard in the hands of Rutherford Birchard Hayes of Ohio, born in 1822, for President; and W. A. Wheeler of New York, for Vice-President. Hayes, an ex-Union soldier who had reached the rank of brevet major-general, a man of considerable inherited wealth, although little known in national life, had given evidence of popularity in his

own State. He was sent to Congress in 1864, elected governor in 1867, and in 1875 defeated William Allen who had previously been elected governor by the Democrats. Personally a man of little ability, temporizing and unaggressive, he won friends by adulation and gifts. His administration proved to be characteristic of the man—"a bread poultice," to quote Beecher's description. However, a less widely accepted view of the man is that expressed by E. Benj. Andrews, who says Hayes "had a resolute will, irreproachable integrity, and a comprehensive and remarkably healthy view of public affairs."[1]

But the most significant fact to be kept in mind in studying the conditions of this period, is that the National Republican party had unchained the lion in its own camp. Success and power had been too intoxicating for those in whose hands had been intrusted the nation's welfare and honor. National credit had been greatly injured abroad, Federal securities being below those of many European States; paper currency was far below par and wholly unredeemable. Political scandals and frauds in official circles "by almost clock-like regularity" had come to light as the period of the election of 1876 approached. Dr. Peck describes Grant's second term as "a Phyric victory" and truthfully says it "was tainted by public scandal of every description."[2] Even staunch Republicans began to stand aghast. The truly sober and patriotic of all parties frankly admitted that the government had fallen into the hands of those who had in their midst a dangerous number of most

[1] The U. S. in Our Own Times, 223.

[2] Harry Thurston Peck, Twenty Years of the Republic, 14.

disreputable thieves. The country generally ascribed Hayes' nomination to J. Donald Cameron, who brought the Pennsylvania delegation in the convention to his support at a critical and opportune time. Without confidence in Cameron and his cohorts, many Republicans feared their evil influence upon Hayes. By funds raised from levies upon officeholders, Chandler, chairman of the National party organization, lavishly supported the ticket; and rascals of the party generally who had escaped criminal prosecution during Grant's stained administration, so warmly supported Hayes that many of the party's best men feared his election would mean to the defaulters a new lease of power and a repetition of its prostitution.

Hayes' letter of acceptance, however, revealing "a man clear in his purposes and courageous in his avowal of them," as a contemporary of his administration expressed the widely accepted view of it, became a factor of considerable support,[3] doubtless contributing no little in overcoming the many impediments entailed upon the party by Grant and those who had been placed in positions of trust. However, Hayes stood upon a platform, the weakness of which his letter could not hide, especially in its attitude regarding the redemption of currency in coin of the United States. Too, the menaces to the party that had developed in the State election of 1874 projected an ugly shadow across once formidable party strongholds. In that year elections were held in twenty-five States, and of these "twenty-three had gone Democratic; even such Republican States as Wisconsin, Ohio, Pennsylvania, and Massachusetts had arrayed themselves in the Democratic column; and

[3] Atlantic Monthly, XLIV., 191.

only a comparative handful of Republicans had been returned to the House."[4] Altogether, as Professor Haworth, himself a Republican, of Columbia University, says: "That the government was in a deplorable condition no dispassionate student of history shall venture to deny. * * * The Republican party, rendered reckless by the possession of too much power, had been weighed in the balance and found wanting."

The Democratic party marched to the battle under the leadership of Samuel Jones Tilden of New York, born in 1814, and Thomas A. Hendricks of Indiana. James G. Blaine, who was not in sympathy with Mr. Tilden's party, says: "Mr. Tilden was in some respects the most striking figure in the Democratic party since Andrew Jackson." In years comparatively an old man when nominated, yet Tilden was strong mentally, and more so physically than in his younger days, for his boyhood was so frail that it is said he never indulged in sport of any kind. Masterful and aggressive, he had reached out and had seized the Democratic standard. In 1874 he led a valiant fight against the famous "Tweed Ring," and was elected governor of New York. He showed both leadership and power in accomplishing the overthrow of the thieving Tweed combination. Blaine gives us a picture of this unique figure that is well worth preserving: "Adroit, ingenuous and wary, skillful to plan and strong to execute, cautious in judgment and vigorous in action, taciturn and mysterious as a rule yet singularly open and frank on occasions, resting on the old traditions yet leading in new paths, surprising in the force of his blows yet leaving a sense

[4] Paul Leland Haworth, The Hayes-Tilden Disputed Election, 3.

of his reserve, Mr. Tilden unquestionably ranks among the greatest masters of political management that our day has seen."[5]

Personally his cold, calculating, scheming nature rendered Tilden unlovable; he was a man above his fellows by "sheer intellect unrelieved by any of those human qualities which win men's love as well as respect," is Doctor Peck's picture of this really wonderful man.[6] A man of unimpeachable integrity, be seems to have worshipped only power, using all things honest to that end. Unlovable he loved no one, for in all his life, we are told, "he never loved a woman." Great, but truly miserable!

When the Democratic nomination was first announced, here and there over the country were heard slight murmurs of discontent in the party ranks. However, shortly the gaps closed and the National Democracy presented a solid front. Added to this formidable force were many of the discontented Republicans, of whom were such men as Charles Francis Adams, Parke Godwin, and Professor Sumner,—men who had grown weary of the sins of Republican misrule. Too, some of the ablest independent journals of that day, such as *The Nation,* lent strength to the Democratic ticket.[7]

The approaching panic and industrial troubles cast their shadow before, bringing to the Democratic cause another no inconsiderable element of strength. Standing upon a strong platform, said to have been written

[5] 2 Blaine, Twenty Years in Congress, 263.

[6] Peck, Twenty Years of the Republic, 115.

[7] The Nation, XXIII. 4; North American Review, October, 1876; Atlantic Monthly, XLIV., 190; Haworth, Hayes-Tilden Election, 37.

by the able Manton Marble in his best literary style, with a strong and worthy leader, buoyed by the successes of 1874, fighting for a righteous cause, the National Democratic party had the brighest prospects of once more entrenching itself in the seat of Federal executive power. The Republicans opposed no worthy barrier; millions of money and the cries of myriads of endangered Federal office-holders, swelling the note of the demagogue as he shouted through the press and from the hustings that "not every Democrat was a Rebel, but every Rebel was a Democrat,"[8] formed the backbone of the opposition.

As a mere matter of history the student should remember that the prohibition and the American Nation parties also had tickets in the field. Neither of these, however, had any serious influence upon the fight between the other two parties.

At sunset of November 7, 1876, the roar of the battle lulled and shifted, indicating not a cessation of the struggle but a change of the forces upon the scene. During the night the smoke of battle slowly lifted from many a questionable field of the struggle, and "on the morning after the election, newspapers of all parties announced the election of Tilden for president."[9] Led by Chandler, chairman of the National Republican committee, the Republicans quickly denied the accuracy of the report, challenging the returns from Florida, Louisiana, and South Carolina. From that moment for many weeks the country trembled upon the verge of financial ruin and national disaster.

[8] Harper's Weekly, IC., 170.

[9] A. K. McClure, Our Presidents, 263; Haworth, The Hayes-Tilden Disputed Election, 46.

When the popular vote was counted it was seen that, of the whole people voting in all the States, Tilden had a majority of at least 252,224.[10] At this time there were thirty-eight States, and their combined electoral votes were 369. Therefore 185 electoral votes were necessary to a choice. The Democratic ticket had carried New York, New Jersey, Indiana, and Connecticut. It "was conceded generally that the Democratic ticket had, without question, 184 electoral votes—within one of an indisputed constitutional majority of the electoral votes necessary for the choice of a President and Vice-President; while it was in like manner conceded that the Republican ticket had 172 electoral votes; leaving the eight electoral votes of Louisiana, the four electoral votes of Florida, and one electoral vote of Oregon, disputed," as Alexander H. Stephens explained in *The International Review,* January, 1878, page 103. Thus it began to appear, as in other instances, that, should the Democratic contention be found to be correct, the popular will stood endangered by the cumbersome electoral machinery. Not until December 6 were the electors to meet in their respective States, and in the meantime the official announcement declaring which set of electors had been elected, rested with the respective State boards of canvassers, whose functions were deter-

[10] Doctor Bigelow, a warm admirer of Tilden, gives the figures

Total vote for Tilden.....	4,300,316
" " " Hayes.....	4,036,016
Tilden's majority.....	264,300

John Bigelow, 2 The Life of Tilden, 8. Doctor Peck, following Johnson, gives 250,000. Twenty Years of the Republic, 15. Doctor Rhodes gives the figures as 264,000. 7 History of the United States, 246.

mined entirely by the law of the State for which they acted. Readily it was foreseen that much depended upon the canvass by these local boards in the disputed States, and the Republicans lost no time in training their heavy guns upon the members.

As soon as it was known what the Democrats claimed the returns upon their face showed, J. Donald Cameron, Grant's Secretary of War, "with perfect frankness," testifies Col. A. K. McClure, who speaks from personal knowledge, averred that he meant "to force the reversal" of the verdict shown by the returns of the disputed States. Whether or not there was any general plot, as is charged by some, on the part of the Republicans to use all means at their command, fair or foul, to secure a final decision in their favor, probably may not be certainly known. The fact remains that the canvassing boards, however much or little influenced by Republican leaders we shall subsequently see, did eliminate from the returns, as certified to them, such a number of Democratic votes as led the Republican electors to assert the right to cast the electoral vote of South Carolina, Florida, and Louisiana. The Democratic electors hung stoutly to the claim that they alone had been rightfully and legally chosen by the people and therefore had the exclusive right to cast the electoral vote. Each set of electors proceeded to discharge what it claimed to be its rightful functions; and so it was that from these three States two sets of certificates, one claiming to cast the electoral vote for Tilden and the other for Hayes, were sent to the seat of the Federal government. Each set had met and had voted upon the day indicated by the Federal law, sending along with its respective certificate the

warrant which it claimed to be the legal and valid authority of the State authorizing the action. Which of these should the Federal counting power accept as the voice of the State?

Aside from the legal questions to which this condition gave rise, and to review which it is our purpose, it will help to a proper historic perspective to remember that the grounds upon which the Republicans claimed that the vote as returned from the county officers should not be taken as indicated on the face of the returns, were "that the Republicans had not opportunity to vote in the South, and the only way to meet such frauds was by the strong arm of the government."[11] Blaine expresses the contention of his party when he says: "In South Carolina and Louisiana, not only was there a considerable number of white Republicans, but in each State the colored men (who were unanimously Republican) outnumbered all the white men. The disparity in South Carolina was so great that the white population was but 289,000 while the colored population was 415,000. In Florida the two races were nearly equal in number, and owing to a large influx of white settlers from the North the Republicans were in a decided majority. Upon an honest vote a Republican majority in each of the three States was indisputably assured."[12]

The Democrats replied that there had been an honest vote and that large numbers of the negroes had voted the Democratic ticket. The truth of this latter assertion was abundantly established, especially as to Florida, when various congressional committees afterwards took evidence touching the conduct of the

[11] McClure, 265. [12] 2 Twenty Years in Congress, 581.

election. But so bitter were the parties in their denunciation of each other that intense excitement ensued. Threats of violence from both parties murmured ominously from various sections of the country.[13] The Democrats were as profoundly in earnest as the Republicans were bitterly determined.

November 10, only three days after the election, and before all the returns from the disputed States had been officially reported by the county canvassers, President Grant sent to General Sherman, in command of the army, the following significant order: "Instruct General Augur in Louisiana and General Ruger in Florida to be vigilant with the forces at their command to preserve peace and good order, and to see that the proper and legal boards of canvassers are unmolested in the performance of their duties. Should there be any ground of suspicion of a fraudulent count on either side it should be reported and denounced at once. No man worthy of the office of President should be willing to hold it if counted in or placed there by fraud. Either party can afford to be disappointed by the result."[14] Within a few hours the President followed this with other telegrams concentrating the Federal troops in the disputed States. Thus the commander-in-chief of the armies of the United States authorized army officers to decide who were the "proper and legal boards of canvassers" and to determine the *grounds "of suspicion of a fraudulent count,"*—a judicial inquiry full of dangerous possibility, and in times of peace by no means belonging either to the executive or

[13] Cong. Record: 44 Cong., 2nd sess.; Proceedings of the Electoral Commission, 3.

[14] Bigelow, Life of Tilden; 2 Blaine, 581.

to the military arm of the government. This executive stroke lent moral, if not actual physical, encouragement to the Republican majorities on the canvassing boards of the disputed States. The order left the unarmed Democracy of those States to contend for their position under the literal muzzle of Federal guns.

As the days went by the situation became more critical. Writing in 1878, Thomas M. Cooley, then chief justice of the supreme court of Michigan, gives a conservative picture of the country under the existing conditions when he says: "For reasons which need not be stated, the people of the country had lost confidence in many of the active men on both sides in several of the Southern States, and each party believed that its opponent would resort to any measures, not excluding violence to the extent of taking human lives, to give the votes to their party candidates. The whole country was excited by charges of crime and outrage, and each party believed that wrongs were being committed for personal and party ends, though each party charged the wrongs upon its opponents. For three months the country was presented with the spectre of a disputed succession; and so intense was the feeling that it seemed highly probable that, at the risk of a civil war, one House of Congress would declare one candidate chosen, and the other would declare the election of his opponent."[15]

What *should* be done?

The President took alarm and "quietly strengthened the military forces in and about Washington" and "saw that the requisite military force was at the Capitol."[16]

[15] The International Review, V., 200.

[16] 2 Blaine, 282.

While the country speculated, partizans on both sides threatened; the Federal army kept busy burnishing its bayonets; and in the three disputed States two sets of men claimed the lawful and moral right to cast their electoral votes. Marshalling its forces, the army hovered about the Republican claimants, encamping about the places of their action or deliberations in disputed districts. The seriousness of the situation was all the more increased because of the fact that the best legal talent of America was apparently honestly divided in opinion as to where lay the legal remedy, and as to what was the proper solution of the questions that had arisen and had daily continued urgently to demand answer.

What *could* be done?

It was proposed that committees of prominent men be sent to the disputed States to overlook the counting by the State canvassing boards. Distinguished men, men who had or who were holding high positions of honor or trust in military or civil life, and in some instances in both, from the two parties went to the capitals of Florida, Louisiana, and South Carolina. The Republicans who had gone for the purpose of seeing "a fair count" returned to Washington declaring that their brother Republicans, who were in the majority on the boards in the disputed States, were in the right in exercising judicial power by which they threw out enough votes to count in the Hayes claimants; and that it was "a fraudulent count" because a fraudulent election, by which the Democrats claimed a majority for the Tilden men as shown by the returns. "The Republicans had the whole machinery of the Government" in their hands in the disputed States.

"The returning boards, which had been created by the carpet-bag rule of the South," [17] were sustained in every instance by the visiting Republican committees, in setting aside the returns on the grounds of alleged fraud in voting at various precincts or in the conduct of the election, and that there had been such intimidation as prevented many Republicans from even attempting to cast their votes. The visiting Democratic committees returned to Washington declaring with equal earnestness that the face of the returns which had come in from the various counties of the respective States showed, not only the correct result, but a result reached upon a vote fairly and honestly cast without fraud or intimidation. They insisted that the canvassing boards had no judicial powers, that their functions were ministerial only, that the canvassing boards properly could only count the votes as certified to them by county officers, and that an alteration of the returns under the existing facts was without warrant. As at first, so the matter stood when the visiting committees had completed their work. Nothing whatever in furthering a solution had been accomplished, but the popular excitement had been greatly augmented. Each side remained equally persistent and unalterably firm in its contention for the right of its claims.

What was done?

As a last hope of an amicable settlement, all eyes finally turned toward Congress. To Congress, or to some branch of that arm of the government, or to some officer of that body or some branch thereof, the Constitution had left the power to count the electoral votes of all the States, and if there should be a majority

[17] McClure, 264.

for any ticket to declare the persons receiving such majority respectively the President and Vice-President. Congress entered upon the stupendous task; out of uncertainty and clamorous discord, Congress laid the foundation for one of the most peculiar chapters in American history.

II.

The Electoral Commission.

THE situation was entirely new to Congress. Immediately after the members of the constitutional convention had signed the Constitution on September 17, 1787, the convention passed a resolution expressing the opinion that, "as soon as the conventions of nine States shall have ratified the Constitution, the United States in Congress assembled shall fix a day on which electors shall be appointed by the States which shall have ratified" the Constitution, the time and place of the meeting of the electors, and the time and place for commencing proceedings under the Constitution being named; that, notice of this having been given, the Senators and Representatives should be elected; that the electors should meet on the day fixed, and vote and transmit their vote to the "Secretary of the United States in Congress assembled;" that the Senators and Representatives should convene at the time and place; and that the "Senators shall appoint a president of the Senate for the sole purpose of receiving, opening, and counting the votes for President; and after he shall be chosen, Congress, together with the President, shall, without delay, proceed to execute this Constitution."[1]

The requisite number of States having ratified the Constitution, the States and Congress carried out the suggestions of this resolution, and on April 6, 1789, the latter assembled for the purpose of counting the

[1] 5 Elliot, 602, Note 266; 8 Ann. Stats. 251.

first electoral votes. A president of the Senate was chosen, and one member from each House was appointed "to sit at the clerk's table to make a list of the votes as they shall be declared." [2] The counting passed without dispute or important incident.

At the counting of the electoral votes cast at the second election, the tellers were appointed, one from the Senate and two from the House; the Vice-President, as president of the Senate, "opened, read, and delivered to the tellers" the certificates of the several electors, "who, having examined and ascertained the votes, presented a list of them to the Vice-President, which list was read to the two Houses." With no important variation, except the "twenty-second joint rule," adopted, according to Colfax while speaker of the House, to avoid the scenes of confusion which accompanied the count in 1857,[3] the counting was thus conducted to 1877.

In 1800 it began to appear that objections to counting certain electoral votes might arise; and the Senate adopted, by a vote of 16 to 11, practically what was afterward embraced in the "twenty-second joint rule," but the House failed to concur, and this rule was not accepted until 1865.[4] As adopted by the two Houses in February, 1865, this joint rule provided that no "electoral vote objected to shall be counted, except by concurrant votes of the two Houses." [5] But this rule suggested no way for determining which votes of two sets of claimants from any State should be counted. The Constitution provides that where no person has

[2] Stanwood, A History of the Presidency, 29.

[3] Cong. Globe, 1066-67: 40 Cong., 3rd sess.

[4] Cong. Rec.: 44 Cong., 2nd sess.; Stanwood, Hist. Pres., 67.

[5] 2 Blaine, 582; Cong. Rec., Id.

a majority of the whole number of electors appointed, the choice shall fall to the lower House where in proceeding to elect a President the State shall constitute the unit of vote. The Republicans refused to concede that this provision vested the House with the power and right to determine between disputant-electors as to the right to vote.

With no rule furnishing a solution, with no precedent, and with the simple command of the Constitution that in the presence of the two Houses the president of the Senate should open the certificates of the electors, and that the votes shall then be counted, when the Federal counting power came to count the electoral votes in 1877, she found herself confronted with rival claimants respectively clamoring to speak for three States. Previous to this time there had been objections to counting the electoral votes of certain States, but never before—and fortunately never since—had the question arisen as to which persons a certain State had appointed to cast her electoral vote. No more important question to republican liberty; no more far reaching question of American government, has ever arisen than this which met the Forty-fourth Congress of the United States. The members of both Houses seemed to have realized the tremendous import of the situation, and the greater numbers of both parties struggled honestly to find a fair solution and one that would bring peace to a sorely depressed country. By no means were divergent opinions marked by party lines. For the most part, however, as Blaine tells us, "It was contended by Republicans that the Vice-President alone had power to open, count the electoral votes, and declare the result, the two Houses of Congress being

present merely as spectators."[6] Senator T. W. Ferry of Michigan, the then pro tem. president of the Senate (Vice-President Wilson being dead), was a loyal Republican; "a partizan," Rhodes says of him, "who could be depended upon to carry out the behests of his party." The Democrats were unwilling to risk the president of the Senate, and there was no way by which the Republican view could be enforced without consent of the House. The Senate repudiated the twenty-second joint rule, and being Republican while the House was Democratic, a disastrous dead-lock or deplorable revolution by one or the other branch was imminent,—and in the wake of either most certainly would have followed civil war. Many truly patriotic of both parties in both branches of Congress and of the country generally were seriously alarmed.

Plan after plan was rejected in the conferences of the respective parties. Some advocated submitting the disputed questions to the Supreme Court of the United States; others preferred the Chief Justice of the court and a member from each House of Congress. The earliest public step inaugurating the movement leading directly to the result finally reached, was taken December 7, 1876, by McCrary, Republican, of Iowa, who introduced a resolution in the House of Representatives, authorizing a committee of five from the House to act with a like committee from the Senate "to prepare and report a plan by which the electoral votes can be counted and the result declared by a tribunal whose authority none can question and whose decision all will accept as final."[7] This was referred to the

[6] 2 Blaine, 583.

[7] Cong. Rec. 91: 44 Cong., 2nd sess.

committee on the judiciary. On December 14, Proctor Knott, Democrat, of Kentucky, as chairman of the committee, referred the resolution back, offering a substitute not materially different, and naming a committee of seven from each House, which was adopted. By special message the Senate was apprised of the action of the House, and later passed a similar resolution, naming its committee.[8]

The Senate having concurred, there were appointed: George F. Edmunds of Vermont, Oliver P. Morton of Indiana, Frederick T. Frelinghuysen of New Jersey, Roscoe Conkling of New York, Logan of Illinois having refused to serve, Republicans; Allen G. Thurman of Ohio, Thomas F. Bayard of Delaware, and Matt. W. Random of North Carolina, Democrats. For its part of the committee the House appointed Representatives Henry B. Payne of Ohio, Eppa Hunton of Virginia, Abram S. Hewitt of New York, William M. Springer of Illinois, Democrats; George W. McCrary of Iowa, George F. Hoar of Massachusetts, and George Willard of Michigan, Republicans. This joint committee were directed to discover and report for the consideration of Congress "a measure, either of a legislative or other character, as may, in their judgment, be best calculated to accomplish the lawful counting of the electoral votes and the best disposition of all questions connected therewith, and a due declaration of the result."

It seems that the two committees, rather the two branches from the respective Houses, held separate meetings. When the House committee met January 3,

[8] Ib. 215, 275, 373. For a brief chronological outline of the proceedings, see Ascher C. Hinds, 3 Precedents Ho. Rep., 240 et seqr.: Ho. Doc. 355, 59 Cong., 2nd sess.

1877, the same differences manifested themselves that had previously developed in party ranks. Payne was strongly committed to the proposition that the function of the president of the Senate should be limited to simply opening the returns. Hunton pressed this proposition upon the consideration of the committee. Hoar and McCrary declared: "We are unwilling to commit ourselves to the principle of the Payne resolution. We can conceive of a condition of things wherein *somebody* might have to take the bull by the horns and count the vote, or the country would be plunged into anarchy and chaos. Suppose that the House should insist that there had been no election and refuse to participate in the count. This might constitute an emergency where the president of the Senate, in the absence of any legislation restricting his duties under the Constitution, might be called upon to act." "In such a conflict," retorted Hewitt, "between the president of the Senate and the House of Representatives, would you sooner intrust the liberties of the people to a single Senator, who happened to be president of the Senate, than to the representatives of the entire American people?"[9] However, Payne seems to have known the failing of the obdurate members. He prepared a collation; "under the genial influence of the food and drink and kindly manner of the host, the members of the committee began to thaw out," and it was finally agreed that a commission consisting of the five senior associate justices should be constituted to decide the controverted question. But on January 12 a joint meeting

[9] Milton H. Northrup, Secretary of the House Committee, Century Magazine, October, 1901, 925, 926, who is also quoted by Rhodes.

of the committee was held, when it was agreed that there should be appointed a commission of fifteen; five from each House and five from the Supreme Court. The names of Justices Clifford, Swayne, Davis, Miller, Field, and Strong were to be put into a hat. One was to be withdrawn and the others were to constitute the judicial members of the commission. Decided opposition on the part of the Democrats to the lot feature developed. They declared they would not "consent that the great office of President should be raffled off like a Thanksgiving turkey," whereupon the plan reported was finally adopted.[10]

On January 18 this committee reported, recommending a bill that provided that at one o'clock post meridian on the first Thursday in February, 1877, both Houses of Congress should meet in the Hall of the House of Representatives at the Capitol. The president of the Senate was named as the presiding officer. The papers from the several States purporting to be the certificates of the electoral votes, were to be opened in the presence of the two Houses; tellers, two appointed by each House, were to read the papers in the presence and hearing of the gathering and make a list of the votes as they appeared from these certificates. In case there was only one return from a State, the president of the Senate was required to call for objections. Should there be objections, they were required to be in writing, concise and without argument, and to be signed by at least one member from each House. When all objections so made were received, the two Houses were to separate and then act thereon under the restriction: "No electoral vote or votes from any State

[10] See Northrup's article and Bigelow's Life of Tilden.

from which but one return has been received shall be rejected, except by the affirmative vote of the two Houses."

Where there should be "more than one return, or paper purporting to be the certificates of electoral votes given by persons claiming to be duly chosen electors," all such returns and papers were required to be opened "in the presence of the two Houses when met as aforesaid, and read by the tellers, and all such returns and papers shall thereupon be submitted to the judgment and decision as to which is the true and lawful electoral vote of such State, of a commission constituted as follows, namely:" five Senators appointed by the Senate; five Representatives appointed by the House; five associate justices of the Supreme Court of the United States, four respectively assigned to certain judicial circuits specifically named, who were to select the fifth,—thus taking five of the nine members of the court. The members of the Commission were required to take a prescribed oath, and when organized either House was forbidden to dissolve the commission or to withdraw any of its members. Objections were to be submitted under the same restrictions as in case of one return.

The law defined the powers of the Commission thus: "When all such objections so made to any certificate, vote, or paper from a State shall have been received, and read, all such certificates, votes, and the papers so objected to, and all papers accompanying the same, together with such objections, shall be forthwith submitted to said Commission, which shall proceed to consider the same, with the same powers, if any, now possessed for that purpose by the two Houses acting

separately or together, and, by a majority of votes, decide whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed electors in such State, and may therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration."[11] The decision was to be in writing and to be entered upon the journal of each House. The counting of the votes was then to proceed in conformity therewith, "unless, upon objection made thereto in writing by at least five Senators and five members of the House of Representatives, the two Houses shall separately concur in ordering otherwise, in which case such concurrent order shall govern."

Debate developed an earnest and extensive opposition that was not confined to either party. Roscoe Conkling, Republican, made a lengthy argument strongly urging the measure; Bayard, Democrat, of Delaware, declared the bill offered "a peaceful conquest over partizan animosity," being "grounded on reason and justice."[12] James A. Garfield, Republican, of Ohio, declared the proposed law dangerous and cumbersome, and vigorously protested that it was "unwarranted by the Constitution;" while Thurman, Democrat, his colleague, lent his influence to the bill, pointing out his opposition to an attempt either by Congress or the Commission to go to the bottom of the election, saying that the proposed law contemplated no more than to learn the decision of the State as between her contesting electors. Foster

[11] Proceedings of the Commission, 5.

[12] Cong. Rec., 800; 44 Cong., 2nd sess.

of Ohio wanted to submit the questions to the Supreme Court; while Frelinghuysen offered as an amendment a measure by which, in cases where the two Houses should disagree as to which of disputed votes should be counted, the question would be submitted to the decision of the president of the Senate, the speaker of the House, and the Chief Justice of the Supreme Court of the United States. Twenty Republican Senators voted with him for this amendment, but it was lost. Morton, Republican, in fairness disqualified himself for the place he was afterward given on the Commission, by saying: "I believe that Rutherford B. Hayes has been elected President of the United States; he has been elected under the forms of law and according to law, and that he is elected in the hearts of the people." He bitterly opposed the bill, pointing out that the members of the Commission named by it would decide along party lines, and that the promoters of the bill had admitted this in naming the Supreme Court judges in the manner proposed by the bill; that this selection by circuits rather than by name was "a harmless little sham that deceives nobody." [18] Altogether, Morton's speech, the only opposition by a member of the committee reporting the bill, presented the strongest and clearest arguments against it. Sherman, speaking more truly than was suspected, said that most likely the decision of the Commission would be determined by the fifth member of the Supreme Court. Hoar, while advocating the bill, admitted that as one of the committee who drew it he had been actuated by party reasons in the manner of naming the members of the Supreme Court.

Each day of debate in Congress only added to the ten-

[18] Ib. 799, 800, 802, 973.

sion of the country generally; and, before debate had ended, business interests in all sections brought their weight to bear upon the members of Congress in urgent appeals for the passage of the bill. Merchants and citizens from New York petitioned for a favorable vote; thirty-seven Republicans, of whom Benjamin Harrison, already prominent in national politics and an ex-governor, was one, with three Democrats of Indiana, sent an urgent appeal for Republican support. Citizens of Richmond, Virginia, added their appeal, calling also attention to the languishing condition of commerce.[14]

The Constitution makes no specific provision for the President holding his office longer than the term for which he is elected. It simply says: "He shall hold office during the term of four years." There was no little uncertainty in Republican quarters as to what would result should the succession be undetermined until after the expiration of Grant's term. Some feared that he might be forced to proceed by *quo warranto* to find someone to whom he could deliver the government.

Altogether, such weight was brought to bear upon Congress as that on vote January 29, 1877, the bill was passed, signed by the President, and became a law. In the House it was supported by 191 to 86, 14 not voting. Of the majority 158 were Democrats and 33 were Republicans; of the negative 68 were Republicans and 18 were Democrats. In the Senate an amendment which forbade the commission "to go behind the returns" was lost by vote of 18, Republicans, to 47, 27 of the latter being Democrats. Then by vote of 47 to 17 the Senate passed the bill. Of the affirmative 26

[14] Ib. 805, 869, 870, 1040.

were Democrats and 21 were Republicans, the one Democrat voting in the negative.[15]

A most remarkable law! Congress shifted its responsibility in cases where there were two or more sets of opposing claimants to the right of exercising the electoral power of certain States, imposing the burden upon ten members, calling to their assistance five of the justices of the Supreme Court of the United States; and this Commission was only empowered to act "with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together." The vast majority of the people's representatives relinquished their rights to a small committee of their brethren,—and this committee, having no powers or rights the whole body of Congress did not possess, was sent to its task with no new light and in association with such a number of the highest branch of the Federal judiciary as precluded the defeated party availing itself of the saving clause of the law, to wit: "nothing in this act shall be held to impair or affect any right now existing under the Constitution and the laws to question, by proceeding in the judicial courts of the United States, the right or title of the person who shall be declared elected,"—"if any such right shall exist." For if any such right existed, the Supreme Court of the United States was disqualified from acting thereon as the highest branch of the Federal judiciary, by virtue of the fact that five of its nine members sat with, deliberated upon the questions which came before, voted with, and adjudicated with the Commission. A farce it were to have poor, frail, partizan man review his own decision—especially under

[15] Ib. 913, 1056.

conditions giving rise to the Electoral Commission! A wonderful act, this bill made a law by the Congress of the United States and approved by President Grant on January 29, 1877!

Pursuant to the provisions of this compromise act, the Senate appointed as its members of the Commission: George F. Edmunds of Vermont, Oliver P. Morton of Indiana, F. T. Frelinghuysen of New Jersey, Thomas F. Bayard of Delaware, and Allen G. Thurman of Ohio. Senator Thurman sat during the Florida case; but, having become unable longer to act, was replaced by Senator Francis Kernan of New York, February 26. The House of Representatives named the following: H. B. Payne of Ohio, Eppa Hunton of Virginia, Josiah G. Abbott of Massachusetts, James A. Garfield of Ohio,—the latter afterward our President,—and George F. Hoar of Massachusetts. Morton, ex-governor of Indiana, was the only member of the joint committee who did not sign the report proposing the Commission.

The four justices of the Supreme Court assigned respectively to the first, third, eighth, and ninth circuits were made members of the Commission by the terms of the law; and these four were required to select a fifth from the remaining five associate justices of their bench. Hon. Joseph P. Bradley was selected and accepted the position. Of the judicial members of the Commission this gave: Nathan Clifford of Maine, Democrat, appointed by President Buchanan, Democrat; Samuel F. Miller of Iowa, a prominent Republican and known to be a decided partizan;[16] Stephen J. Field of California, Democrat, appointed by President Lincoln as a Republican; William Strong, Republican; and Joseph P.

[16] Century, 930, Oct., 1901.

Bradley, Republican.[17] Of the fifteen, eight, Miller, Strong, Bradley, Edmunds, Morton, Frelinhuysen, Garfield, and Hoar, were Republicans; the others were Democrats.

Aside from the fact that the Southern wing of the Democratic party naturally shrank from the results of another war, aside from the duress under which the party generally stood in view of the certainty that should a dead-lock occur when it came to counting the votes the president of the Senate would undoubtedly declare Hayes President, whereupon Grant would employ the Federal forces to sustain that declaration, it is certain that the Republicans who favored the bill obtained Democratic support by what proved to be an *ignis fatuus*. Though the Democrats felt so absolutely sure that their cause had undoubted right behind it, and were willing to submit to any fair method of settlement, it is hard to determine just what weight the assurances which had a share in alluring them to their ruin had upon the final vote. The Democrats fully expected that Judge David Davis of Illinois would be selected as the fifth man from the Supreme Bench. They were not so sure of Davis' politics as they were of his sterling honesty. Blaine tells us: "From the hour when the Electoral Bill was reported to the Senate the assumption was general that the fifth justice selected for the Commission would be David Davis. It was currently believed that Mr. Abram S. Hewitt had given the assurance or at least strong intimation that Judge

[17] Proceedings; Blaine, 2 Twenty Years in Congress, 584; McClure, Our Presidents, 263; John Bigelow, Life of Tilden; J. S. Black, Essays and Speeches; Foulke, Life of Morton; Edw. F. Spencer, Life of Thomas F. Bayard; J. P. Bradley, Miscellaneous Writings; James A. Garfield, Works.

Davis would be selected, as one of the arguments to induce Mr. Tilden and the Democrats to support the Electoral Bill.

"Originally a Republican, Judge Davis had for some years affiliated with the Democratic party, and had in this late election preferred Mr. Tilden to Mr. Hayes. Without any imputation of improper motives there could hardly be a doubt that the Democrats, in their almost unanimous support of the Electoral Bill, believed that Judge Davis would be selected."[18] E. Benj. Andrews says Davis was "a neutral with Democratic leanings, who had been a warm friend of President Lincoln's but an opponent of Grant."[19] In the joint meeting of the committees that drew this bill Thurman and Payne said Davis was neither Democrat nor Republican, while Frelinghuysen regarded him nearer a Democrat.[20] Illinois historians tell us that Davis never claimed to be a Democrat; and that he was not a Democrat is to some extent established by the fact that when Vice-President Arthur succeeded to the Presidency the Republicans made Davis president of the Senate.[21]

Rhodes says that H. B. Payne told him that Conkling had informed Hewitt that Davis "would certainly be the fifteenth man."[22] Northrup, the House clerk of the special committee, confirms that as having been the general understanding.

A large number of the Democrats having committed

[18] 2 Blaine, 584.

[19] The U. S. in Our Own Times, 218.

[20] Northrup, Century, 929, Oct., 1901.

[21] Alex. Davidson and Bernard Stuvé, Hist. Ill., 970.

[22] Rhodes, 7 History of the United States, 263.

themselves to the support of the bill, it was agreed that a vote should be taken with as little delay as possible. On January 25, the day the bill was introduced in the House, the legislature of Illinois elected Judge Davis to the United States Senate. Whether, all things considered, this was a bit of strategy resorted to in the hope of embarrassing Davis so that he would decline to act upon the Commission, thus giving it another more partizan Republican, is not, it seems to me, certainly known. If this were the purpose of the Illinois Republicans, who, of course, in such case must have acted under the influence of the national party leaders, it succeeded admirably. A contemporary Republican writer ascribed the election of Davis to the Independents assisted by Democrats,[23] and Rhodes sees no reason for rejecting that claim.[24] The majority in the Illinois legislature was Republican.[25] His election was clearly within the power of the Republicans. However, as Davis' term of service in United States Senate would not begin until the following fourth of March, the Democrats in Congress did not believe that this election should or would prevent his service upon the Commission, especially in view of the fact that before the time for the term to begin the Commission must of necessity have terminated its work. And so in good faith the Democrats carried out their agreement to support the bill, relying upon the promise of the Republicans that Judge Davis should and would serve. In fact, as Northrup says: "It had gone too

[23] Appleton's Annual Cyclopaedia, 1877, 383.

[24] 7 History of the United States, 263.

[25] Bigelow, The Supreme Court and the Electoral Commission, 15.

far for either party to recede with dignity or with honor,"[26] especially as, before the vote, there was nothing to indicate that Davis would not serve. Why his service upon the Commission should have been of doubtful propriety, as Rhodes suggests it would have been, it seems to me only a partizan Republican can comprehend; but it is said that Davis himself insisted that such service would be improper.[27] This was after the bill became a law; in so long remaining silent he proved himself as strong a Republican ally as though he had served and had held with the Republican majority. When the four justices met for the purpose of naming the fifteenth man, Strong announced that Davis would not serve. "I will not believe it," Clifford is said to have retorted, "unless I should absolutely have it from his lips or over his hand." Whereupon, it is said, Strong later brought a statement signed by Judge Davis in which he refused to serve.[28]

Judge Bradley of New Jersey seemed to offer the only other opportunity of finding from the Supreme Bench a man at all acceptable to the Democrats. Pleasing in his personality, he had ingratiated himself with the Southern people by his judicial opinion holding what is known as the Enforcement Act unconstitutional; and for some time he had presided acceptably over the Southern Federal circuit. He was aware of the fact that his brothers of the bench had been chosen because of their political predilections, and he felt keenly the fact that upon his opinion would rest the

[26] 62 Century, 934.

[27] Stanwood, A History of the Presidency (1904), 388.

[28] Conversation of H. B. Payne with Rhodes: 7 Hist. U. S. 264.

responsibility for the decision that the Commission should reach.[29] However, when notified that he had been selected, he accepted the position.

January 31, 1877, the Commission organized, Mr. Justice Clifford presiding. A brief set of rules was adopted providing for the submission of evidence and that counsel might be heard. On February 1, as provided in the law, the two Houses met in joint meeting in the Hall of the House of Representatives, the president *pro tempore* of the Senate presiding. Both Democrats and Republicans presented the most cheerful front, and confidence and general good humor prevailed.[30] At three o'clock of the same day the Commission met in the Supreme Court room in another part of the Capitol; the judges, wearing their judicial robes, sat in the center, with the Senators on the right and the Representatives to the left. President Clifford notified the president of the Senate and the speaker of the House that the Commission was "ready to proceed to the performance of its duties."

[29] Joseph P. Bradley, Miscellaneous Writings, 7, 9.

[30] Monroe, 531.

III.

The Certificates—The Impeachments.

ON February 1 the president of the Senate, presiding over the two Houses in joint meeting, was proceeding to open communications purporting to be the electoral votes from the several States, that the votes might be counted. Florida having been reached, he certified to the Commission: "More than one return or paper purporting to be a return or certificate of the electoral votes of the State of Florida having been received and this day opened in the presence of the two Houses of Congress, and objections thereto having been made, the said returns, with all the accompanying papers, and also the objections thereto, are herewith submitted to the judgment and the decision of the Commission, as provided by law."[1] So important is it that we get a clear comprehension of this evidence, that the following detailed description is justified.

First. Certificate No. 1, as numbered by the president of the Commission, was the certificate of M. L. Stearns, dated Dec. 6, 1876:

"Pursuant to laws of the United States, I, Marcellus L. Stearns, governor of Florida, do hereby certify that Fred C. Humphreys, Chas. H. Pierce, William H. Holden, and Thomas W. Long have been chosen electors of President and Vice-President of the United States, agreeably to the provisions of the laws of

[1] Proceedings, 29, 34.

said State and in conformity to the Constitution of the United States of America, for the purpose of giving in their votes for President and Vice-President of the United States, for the term prescribed by the Constitution of the said United States, to begin on the fourth day of March," 1877. Accompanying this was the certificates of these men that they had met pursuant to this authority and had cast their votes for Hayes for President, and for Wheeler for Vice-President.

Second. Certificate No. 2, dated on the same day and at the same place: "I, William Archer Cocke, attorney-general of the State of Florida, and as such one of the members of the board of State canvassers of the State of Florida, do certify that, by the authentic returns of the votes cast in the several counties of the State of Florida, at the general election held on Tuesday, November 7, 1876, said returns being on file in the office of the secretary of State, and seen and considered by me, as such member of the board of State canvassers of the State of Florida, it appears and is shown that Wilkinson Call, Jas. E. Yonge, Robert B. Hilton, and Robert Bullock were chosen the four electors of President and Vice-President of the United States; and I do further certify that under the act of the legislature of the State of Florida establishing said board of State canvassers, no provision has been enacted, nor is any such provision contained in the statute law of this State, whereby the result shown and appearing by said returns to said board of State canvassers can be certified to the executive of said State."

Accompanying this certificate are the jurats of the men named therein as electors, wherein they swear

to protect the Constitution of the United States, etc., and that they are entitled to hold office under the constitution of Florida, and that they will well and faithfully perform the duties of electors; and their certificate, in the regular form, casting their votes as electors for Tilden and Hendricks; and following this the further certificate: "And we further certify that, having met and convened as such electors, at the time and place designated by law, we did notify the governor of the State of Florida, the executive of said State, of our appointment as such electors, and did apply to and demand of him to cause to be delivered to us three lists of the names of the electors of the said State, according to law, and the said governor did refuse to deliver the same to us." The date is the same.

Third. Certificate No. 3, is dated January 29, 1877, and is made by Geo. F. Drew, governor. Governor Drew had succeeded Governor Stearns, had entered upon the duties of his office and was unquestionably recognized as the rightful executive. He certified that, whereas, pursuant to an act of the legislature of Florida approved Jan. 17, 1877, a canvass of the returns of the election of November 7, on file in the office of the secretary of State, had been made by the State canvassing board, "according to the laws of the State and the interpretation thereof by the supreme court," and that at such canvass it had been "duly determined, declared, and certified," that the men as named in number two, the Tilden men, had been duly, as shown by said returns, elected electors; and, whereas, in a *quo warranto* proceeding wherein the Tilden men were relators and the Hayes men respondents, the circuit court of Florida, "after full consideration of the law

and the proofs produced on behalf of the parties respectively, by its judgment determined that said relators were, at said election, in fact and law, elected such electors as against the said respondents and all other persons:

"Now, therefore, and also in pursuance of an act of the legislature entitled, 'An act to declare and establish the appointment by the State of Florida of electors of President and Vice-President of the United States,' approved January 26, 1877," the governor certified the Tilden men the electors "chosen, appointed, and declared as aforesaid."

Following this was again the certificate of the Tilden men, wherein they recite the last above mentioned certificate, set out their action on December 6; and that, having counted their votes cast as electors on the said 6th day of December, it was seen that all four were for Tilden and Hendricks. This certificate was dated January 26th, 1877.

Then immediately follows a certified copy of the act of the Florida legislature approved January 17, 1877. This is also accompanied by the official certificate of the canvass of the State board as made on January 19, 1877, pursuant to the said act of the legislature, wherein the vote is shown by counties, the returns being those from the counties and on file in the office of the secretary of State, and it is certified that the Tilden men received:

Call.....24,437.
Yonge.....24,440.
Hilton.....24,437.
Bullock.....24,437.

and the Hayes men:

Humphries.....24,349.
Pearce.....24,345.
Long.....24,344.
Holden.....24,350.

Also accompanying this certificate is the further certificate of the governor that these certificates of the secretary of State are in due form and made by the proper officer.

The last paper with this certificate is a certified copy of the act of the legislature approved January 26, 1877, "to declare and establish the appointment by the State of Florida of electors," the Tilden men being therein named as such.[2]

To this evidence various Senators and Representatives submitted objections as follows:

To No. 1, the certificate of Governor Stearns, and the one on which the Hayes men stood, that it "was and is in all respects untrue, and was corruptly procured and made in pursuance of a conspiracy" between Governor Stearns and the Hayes men; and that if said certificate and the acts of the Hayes men thereunder had ever had any validity, it had been annulled and completely destroyed by the above mentioned acts of the legislature and the adjudications of the Florida courts, especially the judgment in the *quo warranto*, wherein the court determined that upon the day and date the Hayes men attempted to cast the electoral vote of the State, they were "mere usurpers, and that all and singular their acts and doings as such were and are illegal, null, and void;" and that said court had further determined that the Tilden men on the 6th

[2] Proceedings, 11 to 28.

day of December, and at all times since, were the duly appointed electors and entitled at all times to perform the duties as such.

To No. 2 the Republicans objected on the ground that it was not "authenticated according to the requirement of the Constitution and laws of the United States," so as to entitle the votes stated therein to be counted; and that there was with it "no certificate of the executive authority of the State of Florida of the list of names of said electors," nor any "valid certification or authentication of said electors."

To Nos. 2 and 3 there was the joint objection that the Tilden votes could not be counted because "by a certificate of the electoral vote of the State of Florida, in all respects regular and valid and sufficient under the Constitution and laws of the United States, and duly authenticated as such and duly transmitted to and received by and opened by the president of the Senate in the presence of the two Houses of Congress," it was shown that the Hayes men were the electors.

To No. 3 there was the further objection on the ground that Gov. Drew was not holding the office of governor at the time the electors were appointed nor when their functions as electors were exercised; and because the proceedings as recited in his certificate "as certifying the qualifications of the persons therein claiming to be electors are *ex post facto,* and are not competent under the law as certifying any right in the said" Tilden men; and, last, on the ground that "the said proceedings and certificates are null and void of effect as retro-active proceedings."

Art. II., section 1, of the Constitution, authorizing electors, provides that "no Senator or Representative,

or person holding an office of trust or profit under the United States, shall be appointed an elector." The Democrats alleged that on December 3, 1872, Humphries, one of the Republican claimants, was appointed United States shipping-commissioner for the port of Pensacola. This is an office of trust and profit under the United States. The Democrats asserted that Humphries was yet holding this office on December 6, the day on which he attempted to act as an elector. Upon this ground they objected to the vote cast by him, should it be decided that the Republican votes were to be counted,—on the ground that he could not be constitutionally appointed an elector.[3]

With the positions of both sides thus plainly defined in the objections that had been submitted in writing, this record and these objections passed for the time into the jurisdiction of the Commission. What that jurisdiction was remained to be discovered,—a question no less difficult than was that concerning a proper, just, and legal disposition of the questions raised upon the objections.

Friday, February 2, the Commission entered upon a consideration of the Florida case. This tribunal, theretofore unknown to the American Constitution, the result of a most bitter national party struggle,—the resort of a coerced Democracy,—had before it a case as much without a precedent in jurisprudence or administrative procedure as was the Commission without express warrant in the fundamental charter. Two sets of litigants presented themselves, each represented by the best legal talent of the day, and each bitterly uncompromising in the intensity with which it insisted

[3] Ib. 28.

upon the right of its claims. The Tilden men claimed that on December 6th, 1876, having been duly elected at the election of November 7, and having been so declared, they cast for the Democrats the electoral vote of Florida; while the Hayes men insisted that on the same day of December they had cast the electoral vote of the State, having been duly authorized, for the Republican ticket. How should the Commission determine which, if either, of these votes should be counted? How far back is the chain of the electoral title, and by what kind of evidence, was the Commission to proceed? There was no exact precedent, it is true; but the questions involved fundamental principles of our government and legal rules that were plain and axiomatic. With these greater lights uncovered it remained to the majority power of the Commission to answer these questions,—questions which affected not alone the succession to the Presidency, but which involved definitions of the nature of our dual government, and which might become precedents by which to measure the rights of the States and the powers of the Federal government in some most vital matters.

The Commissioners, not entirely to the satisfaction of either side, determined the order of the battle. Two objectors, members of Congress, on each side, were required to open the case by stating the ground upon which the party they respectively represented relied for supporting its contention.

David Dudley Field, of New York, a Republican who had supported Hayes at the polls but who became convinced of the right of Tilden's case, a member of the House, and J. Randolph Tucker, of Virginia, another member of the House, opened the case for the Demo-

cratic objectors. Field spoke first. He began by calling attention to the fact that the majority of the votes in Florida at the election on November 7, 1876, had been cast for the men who claimed the right to cast the electoral vote of that State for Tilden, saying: "Nevertheless, a certificate comes here signed by the then governor of the State certifying that the Hayes electors had a majority of the votes. By what sort of jugglery that result was accomplished I now take it upon me to explain."[4]

He then charged fraud on the part of certain county canvassing boards, that of Baker county especially, resulting in a return for the Hayes men, and quoted the evidence upon which his charge was based, and offered it in the event the Commission should decide to go behind the action of the State canvassing board.[5] Passing to the canvass by the State canvassing board, he charged that it was by sustaining the gross frauds of the county board of Baker county that the State board had been able to declare in favor of the Hayes electors. He charged that the State board knew the fraud of the county board, and that it had sustained the county fraud through a confederacy entered into by the Republican majority of the State board, the county board, and Governor Stearns, and that the governor upon that fraud had issued to the Hayes men the objectionable certificate. He said that, should the Commission decide that the action of the State board was open to inquiry, it would be shown that the second canvass made by the pro-Hayes board, made under a *mandamus* as we shall see, as to the Presidential electors "used in all of

[4] Ib. 35.
[5] Ib. 30 and 37.

its falsehood," the Baker county returns. He said that these charges had been sustained by the State of Florida, first, in a *mandamus* proceeding against the board that had made the pro-Hayes report, in which proceeding the supreme court of the State held that the action of the State board by which alone the Hayes men could claim authority had been determined to have been an usurpation; second, by a proceeding in the nature of a *quo warranto, begun and served before the Hayes men voted as electors,* as were the *mandamus* and injunction begun and served before the State board had rendered its pro-Hayes finding, against the men themselves who claimed to be the electors and who voted for Hayes, in which action the court held that the attempt by the Hayes claimants to exercise the functions of electors, to be a usurpation and their action in toto and *ab initio* null and void, and in which action it was alone held by the court that the acts by which the State board had claimed to reach a pro-Hayes result were unlawful and invalid; and, third, he pointed out that this charge had further been sustained by certain acts of the legislature of Florida, in the exercise of her right of appointment, in which the judgment of the court had been ratified, and the void nature of the pro-Hayes actions affirmed.

He contended that these acts of the State, subsequent to the election, had settled the question of title as between the Hayes and Tilden claimants, and in favor of the latter. In conclusion he asked:

"Who is it whose acts we are now seeking to impeach? It is the then governor of Florida, Stearns; * * * Stearns, the man who controlled the State

canvassing board sitting to certify whether he and they were to continue in office.

"Is it a true proposition of law," he asked, "that you cannot inquire whether he has acted fraudulently? If it be true that the certificate of the governor is conclusive evidence that these persons were elected, then it follows that the certificate would be sufficient if there were no election at all. * * *

"Here is the certificate," he concludes; "one feels reluctant to touch it. Hold it up to the light. It is black with crime. Pass it round; let every eye see it; and then tell me whether it is fit to bestow power and create dignity against the will of the people. One of the greatest poets of the palmy days of English literature, writing of the coming of our Savior has said:

> —And ancient fraud shall fail,
> Returning Justice lift aloft her scale.

Ancient fraud! Was there ever fraud like this? In previous ages fraud has succeeded only because it has been supported by the sword, and protesting peoples have been powerless before armed battalions. Never yet in the history of the world has a fraud succeeded against the conscience and will of a self-governing people. If it succeeds now, let us hang our heads for shame; let us take down from the dome of this Capitol the statue which every morning faces the coming light; let us clothe ourselves with sackcloth and sit in ashes forever."[6]

It seems that the fair order of procedure would have been to have had a Republican representative state the case for that side, but Representative Tucker was re-

[6] Ib. 44, 45.

quired to follow, thus giving the Republican objectors an opportunity to answer both the Democratic objectors while the latter had no opportunity to reply. He called attention to the objections filed against the Hayes claimants, which alleged that the purported votes of the Hayes men "did not truly represent any votes or lawful acts," and, like the Stearns certificate, "were made out and executed in pursuance of the same fraudulent conspiracy." Succinctly he referred to the sixth objection filed against the Hayes votes, in which objection is set out "the *quo warranto* proceeding initiated prior to the votes given for Hayes and Wheeler by these pretended electors on the 6th day of December," which proceeding resulted in a judgment which declared the said acts of the Hayes men utterly null and void, and "that they were usurpers and pretenders to said office."

"We object to these votes being counted," he said, "because we say that these men were not elected according to the law of Florida, and not being so elected can have no title to the office; * * * Is the power of a returning board, tainted with fraud, based upon lawlessness, to conclude the judgment of the American people and put a usurper in the seat of Washington? That is the question. * * *

"I apprehend that the powers of the two Houses of Congress and of this tribunal as their substitute are not less in this inquiry than the powers of a court upon a *quo warranto* proceeding. We are now standing as the guards to the entrance of the executive department, and we are to let no man pass that has not the password of the people of the United States. We have a

right to question his title, and if he has no title never to permit him to enter."

Those who followed Tucker made capital to some extent out of his statement that the powers of the Commission were not less than the powers of a court upon a *quo warranto* proceeding. But there is nothing whatever inconsistent in that position. A *quo warranto* proceeding inquires for the title, whether there ever were any title, in the claimant. That is exactly what the Commission did. The Democrats insisted that one thing established title, gave valid credentials, while the Republicans stood upon another ground and that which was sustained by the majority. They differed as to what was the *proof* of the title. Watch Tucker's argument:

"Who appoint electors? 'Each State shall appoint.' What is the meaning of that? I apprehend that the word 'State' in the Constitution has three or four meanings, one indicating the territory in which the population lives; another the people themselves as an organic body-politic,—and another the State government. In this particular case I apprehend that it means the State as a body-politic, as an organic society, not its government, because the next sentence says that each State shall appoint 'in such manner' as its 'legislature may direct.' There you have the functional power of election in the State as a body-politic; the manner of the election to be prescribed and directed by its legislature. The law-making power of the State directs the manner; the substantial power is in the State. * * * In every appointment or election two elements enter; first, the exercise of the elective function; second, the exercise of the determining function. * * * I therefore say that in Florida the elective function was in the body

of the people of the State; whoever the body of the people of the State elected to be its electors were its electors and had title to the office, according to the language of the Federal Constitution, the authority I have read. The question of whether they should have been determined to have been elected by the board of canvassers is an entirely different question. If the board of canvassers, either contrary to law or transcending their legal authority, fraudulently counted in as elected those who were not elected by the people, their act was void. * * * The power of determination can never be valid where it usurps the elective function which is vested by the law in any other body."

Notice, as he proceeds, where he places the power to determine finally the validity of the action of the State canvassing board:

He insisted that the laws of Florida made the State judicial power "the ultimate determinant authority" in a review of the acts of the State canvassing or returning board; and that Congress must "give force and validity to the action of the returning board as reviewed by the judicial authority and as adjudged by the judicial authority of the State," because "the judicial procedure in that case becomes a part of the determinant authority in the election provided by the State, and therefore you say that a man is elected in the manner prescribed by the State law, when he is determined to be elected by the State law, and that determination is revised and adjudged before the State judiciary. * * * Therefore I say to gentlemen here, if they want to stand upon the ground of not being permitted to go behind State authority in these matters, they must take the whole of the State authority.

* * * Shall you hold the commission which the State of Florida has declared to be invalid, to be valid, in order to stifle the elective power of the people and give power to the determinant functions of the oligarchy? That is the question."[7]

Tucker having concluded for the Democratic objectors, the Commission took a recess until three in the afternoon of the same day. On convening, Shellabarger by request laid before the Commission "the Senate report upon Florida containing the law of Florida and other matters pertinent to this discussion," which matter was taken as part of the Republican statement.

John A. Kasson, a representative from Iowa, opened the case for the Republican objectors. He confined his arguments to the objections made to the Stearns certificate, alleging that in reaching a pro-Hayes result the State officers had been guilty of no fraud; and that, so far as fraud at the election was concerned, when the Democrats pointed to a Republican fraud in one county, the Republicans would invite them to a Democratic fraud in another! And as an instance he said go to "Alachua county and find at one precinct a railroad train of non-resident passengers getting off on their passage through and voting" the Democratic ticket.

He argued that the power of the Commission extended no further than "to do the ministerial act of counting the votes in the stead of the president of the Senate."[8] He said the power "to count" carried a "narrow circuit of discretion" and only broad enough to ascertain whether the papers before the Commission as certificates were genuine, not counterfeit, duly verified

[7] Ib. 46 to 51.
[8] Ib. 55, 58.

by State authority, and as required by the Constitution and laws. "It is broad enough to ascertain whether the electoral college has complied with the law. This is a ministerial examination," he insisted, and that the Commission must determine from the face of the certificates offered by the two sets of claimants "which is the true certificate, more in compliance with law, and bearing upon its face greater evidence of its authenticity." In determining "which is the authentic certificate and the authenticated vote," his position was that the answer given by the State canvassing board as first made by it must be taken as final and conclusive. "There is," he said, "necessity in public affairs, and, in the very organization of society and of political communities, an absolute necessity to have some final jurisdiction. There must be somewhere an authority by which we stand, even if it be impeached by charges of fraud. Where is that authority? Is it here? Is it in the governor? Is it in the canvassing boards? Is it in the State legislature? Is it in the State judiciary? Where is it?"

He answered these questions by finding that the final jurisdiction was *by the laws of Florida* reposed not in the judiciary, not in the executive, not in the legislature. His position differed from the Democratic contention as to the interpretation to be given the local laws of Florida and as to the forum from which the final and accepted interpretation should eminate.

George W. McCrary, a representative from Iowa, followed, closing for the Republican objectors. At once he addressed himself to the question, "How far can this Commission go in this inquiry?"

Answering he said: "Gentlemen have argued, and this whole case rests upon the argument, that the appointment of the electors is by the votes of the people at the polls; and that, therefore, the Commission must inquire how the people voted at the polls in order that Congress may decide who have been appointed electors."

The most casual reader will readily see the distortion thus given the Democratic contention. One can hardly see why an honest man should have made such a statement before so learned a body who had just listened to the opening statements of the other side, other than that the speaker must have felt the weight of the logic of Tucker and the eloquence of Field, and blundered in groping for an avenue of escape.

McCrary continued: "But, may it please the Commission, the appointment of the electors is not by the vote of the people at the polls. That may possibly be one of the steps required by the laws of the State, but the appointment of the electors is by the vote of the people cast at the polls, by the action of such tribunals as the State laws have created, canvassing, determining, and ascertaining the result of that vote, and by the issuing in pursuance of that canvass of the evidence showing the election of the electors. The State acts through its officials, through its constituted authorities, and the State declares who has been appointed. Therefore, when the Constitution says that we shall inquire who have been appointed electors by the State in accordance with the laws of the State or as directed by the legislature of the State, we are simply to inquire what persons have been declared to be electors by the

tribunal and the authority which the State law has created for that purpose." [9]

Thus the Republican objectors planted their stronghold upon the position that the *ascertainment and declaration* "by the tribunal and authority which the State law has created for that purpose," was final, whether fraudulent, mistaken or otherwise: and differing from the Democrats, a difference wide and vital, in the designation of what were "the tribunal and authority which the State has created" "for the purpose of ascertaining and declaring the result of the popular election." The Republicans stopped short of the State courts as *one* "of such tribunals as the State laws have created" for such purposes. By stopping at the State canvassing board the Republicans dismissed the proceeding in *quo warranto*, and rid themselves of the construction given the State law by the supreme court in the mandamus proceeding against the State canvassing board and the injunction served upon it before the pro-Hayes finding, and to reach which finding the two Republicans of the State board disobeyed the injunction and were afterwards held in contempt of court. While the Democrats contended that the Commission should "take the whole of the State authority;" that the judicial procedure "becomes a part of the determinant authority in the election provided by the State, and therefore you say that a man is elected in the manner prescribed by the State law, when he is determined to be elected by the State law, and that determination is reviewed [when, of course, it has been called in

[9] Ib. 66.

question] and adjudicated upon by the State judiciary."[10]

McCrary argued that the Democrats were wrong in contending that the judgment, rendered after the day on which the electors voted, in a *quo warranto* proceeding begun and served upon the defendants before the vote, but after they had assumed the duties of the office they claimed the right to fill, "relates back to the date of the filing of the petition and vacates and vitiates everything that was done in the meantime. That, I think," he said, "is not the law." His reason for his conclusion was that "at the time of the judgment every function of the office of Presidential elector had been exercised. The office had ceased to be. The officer had ceased to be and was *functus officio.*"[11]

If he were never *the officer,* what? retorted the Democrats,—but the answer will be fully discussed in a subsequent chapter, where the grounds will be examined upon which the Democrats contended that what the Republicans called *credentials* were not such, and that therefore the Hayes men did not, as McCrary insisted his clients had done, "discharge every function that belonged to them under the Constitution and laws on the 6th day of December," *because on that day no electoral function belonged* to the men thus attempting to cast the Florida electoral vote for Hayes. This fact, they said, was established by the proceedings in the Florida courts, especially the *quo warranto,* an action incorporated by the legislature of the State into her judicial procedure from the common law of England, and that the prime purpose of such an action

[10] Ib. 48.
[11] Ib. 66, 67.

was to determine the nature and validity of credentials in cases of this very kind; and that for this reason, no limit having been fixed by any Federal provision beyond which such cases might be tried, the adjudication was part of the appointment, the *final credential* proving the will of the State in its act of appointment of electors.

IV.

The Battle Between Counsel.

THE objectors having concluded their arguments, the president of the Commission inquired of the Democratic objectors whether they proposed before argument of counsel to offer evidence. Representatives Field and Kasson each endeavored to answer, but the president and Commissioner Edmunds interrupted, the latter submitting "that the objectors have exhausted their functions, and the rest of the case belongs to counsel." Whereupon Merrick, at the request of O'Conor, of counsel for the Democrats, stated that they expected to offer evidence prior to argument by counsel, continuing: "We have been under the impression that the evidence was already before the Commission, without any necessity for a further offer on our part." Commissioner Miller promptly asserted that he did not understand that any evidence had been admitted in the case, and suggested that by the next day counsel who expected to offer evidence prepare a brief synopsis of it. Then Evarts for the Republicans declared that they had "no evidence to offer, unless there should be a determination to admit evidence inquiring into facts, and evidence should be introduced against us which we should then need to meet."

After some further immaterial talk the Commission adjourned to meet the following day. Having convened pursuant to adjournment, Charles O'Conor of New York, Jeremiah S. Black of Pennsylvania, Richard

T. Merrick of Washington, Ashbel Green of New Jersey, and William C. Whitney of New York, appeared in opposition to the Stearns certificate; and William M. Evarts of New York, E. W. Stoughton of New York, Stanley Matthews of Ohio, and Samuel Shellabarger of Ohio appeared in opposition to certificates numbers two and three, the credentials upon which the Tilden men relied.

The president stated that under the rule two counsel on a side would be heard, and suggested that the Democratic counsel "should make their offers of proof in a concise, well-arranged classified form;" and that the Republican counsel would then make "their provisional offers of proof in case there shall be a decision that proofs are admissible." But the proposition startled Evarts; he did not propose thus to show his hand; he was naturally quite willing to see what his enemy held, but his own forces he preferred to hold in reserve and under cover. Commissioner Edmunds came to his support, saying: "I do not think it is understood, Mr. Evarts, certainly it is not by myself, that supposing you object to the proof offered by Mr. O'Conor you are necessarily called upon at the same time to state what you expect to prove in reply if his proofs shall be received. * * * You will not be called upon to offer proofs on your own side, so far as I understand, because it may not be necessary."[1]

O'Conor took grave exceptions to the proposed procedure indicated by Edmunds, pointing out that upon the question of the admissibility of the evidence it would be necessary to argue the whole case, submitting that "all the needful evidence should come in subject

[1] Proceedings, 72-6.

to such questions as to its competency and its effect as may exist, for the reason that they necessarily incorporate themselves with the main question that you have finally to decide." But the president stopped him and required him to state what he proposed to offer in evidence. He then, having been forced to prepare it hurriedly, read a statement of what the Democrats regarded "as desirable matter in the nature of evidence to be laid before this Commission—as distinct, and as succinct, and as brief, and as explanatory and intelligible a statement as, by the utmost effort, I could possibly make," he explained, as follows:

"First. On December 6, 1876, being the regular law day, both the Tilden and Hayes electors respectively met and cast their votes, and transmitted the same to the seat of government. Every form prescribed by the Constitution, or by any law bearing on the subject, was equally complied with by each of the rival electoral colleges, unless there be a difference between them in this: The certified lists provided for in section 136 of the Revised Statutes were, as to the Tilden electors, certified by the attorney-general; and were, as to the Hayes electors, certified by Mr. Stearns, then governor. All this appears of record, and no additional evidence is needed in respect to any part of it.

"Secondly. A *quo warranto* was commenced against the Hayes electors in the proper court of Florida on the 6th day of December, 1876, before they had cast their votes, which eventuated in a judgment against them on the 25th of January, 1877. It also determined that the Tilden electors were duly appointed. The validity and effect of this judgment is determinable by the

record; and no extrinsic evidence seems to be desirable on either side, unless it be thought (first) that the Tilden electors should give some supplemental proof of the precise fact that the writ of *quo warranto* was served before the Hayes electors cast their votes, or (second) unless it be desired on the other side to show the entry and pendency of an appeal from the judgment in the *quo warranto*. [However, the appeal was settled in favor of the Tilden men and known to the Commission before its final vote.]

"Thirdly. To show what is the common law of Florida and also the true construction of the Florida statutes, the Tilden electors desire to place before the Commission the record of a judgment in the supreme court of that State on a mandamus prosecuted on the relation of Mr. Drew, the present governor of that State, by force of which Mr. Stearns was ousted and Mr. Drew was admitted as governor. This judgment, together with the court's opinion, is matter of record, and they require no other proof; nor is there any technical rule as to the manner in which this Commission may inform itself concerning the *law* of Florida.

"Fourthly. The legislation of Florida subsequently to December 6, 1876, authorizing a new canvass of the electoral vote, and the fact of such new canvass, the casting anew of the electoral votes, and the due formal transmission thereof to the seat of government, in perfect conformity to the Constitution and laws, except that they were subsequent in point of time to December 6, 1876, are all matters of record and already regularly before the Commission.

"Fifthly. The only matters which the Tilden electors

desire to lay before the Commission by evidence actually extrinsic will now be stated.

"I. The board of State canvassers, acting on certain erroneous views when making their canvass, by which the Hayes electors appeared to be chosen, rejected wholly the returns from the county of Manatee and part of the returns from each of the following counties, to-wit: Hamilton, Jackson, and Monroe.

"I trust I have omitted none, but I have had no consultation.

"In so doing the said State board acted without jurisdiction, as the circuit and supreme courts in Florida decided. It was by overruling and setting aside as not warranted by law these rejections, that the courts of Florida reached their respective conclusions that Mr. Drew was elected governor, that the Hayes electors were usurpers, and that the Tilden electors were duly chosen. No evidence that in any view could be called extrinsic is believed to be needful in order to establish the conclusions relied upon by the Tilden electors except duly authenticated copies of the State canvass, that is the erroneous canvass as we consider it, and of the returns from the above named three counties, one wholly and the others in part rejected by the State canvassers.

"II. Evidence that Mr. Humphries, a Hayes elector, held office under the United States."

Mr. Evarts for the Republicans objected to this "evidence now offered," as he expressed it. Whereupon Mr. Black, for the Democrats, said: "We insist that the whole of the evidence, including this mentioned by Mr. O'Conor in this paper of his, has been given already, and is a part of the record. A question arose

before the two Houses of Congress whether certain votes offered for President and Vice-President ought to be counted or not. Whether they ought or not depended upon the question whether they were votes or papers falsely fabricated. Not with any purpose of going behind the appointment of the electors, but for the purpose of ascertaining what electors had been appointed, who were the true agents of the State in casting its vote, the two Houses proposed to use their verifying power. Their purpose was not to entertain an appeal from the decision of the State, but to ascertain what that decision was. This involved a question of fact. It was absolutely necessary that the conscience of the two Houses should be informed concerning the truth of the case which they were to decide, and accordingly they took a perfectly legitimate and proper mode of ascertaining it. They sent their committees and had evidence taken. These committees collected the documents, put the whole thing into a proper form, and then came back and offered it to the two Houses, by whom it was received and made part of the record of this case. And when you were appointed as a substitute for them and became the keepers of their conscience, they required you to tell them what they ought to do and to make the decision which upon the evidence that was before them they ought to make. That evidence, I say, was put in, and the portion of it which was taken by committees of the House of Representatives was laid before that House after a fierce struggle and the filibustering of half a night to keep it out. The president of the Senate, the president of the two bodies, handed this evidence, all of it, over

in bulk to be used here by this Commission. You have seen it. * * *"

On motion of Judge Miller it was decided that counsel be allowed two hours on each side "to discuss the question raised by Mr. Evarts' objection to testimony, as to whether any other testimony will be considered by this Commission than that which was laid before the two Houses by the president of the Senate, and, if so, what evidence can properly be considered; and also the question what is the evidence now before the Commission."[2]

An amendment proposed by Judge Field was lost. His proposition was that counsel be heard "on the effect of the matters laid before the two Houses by the president of the Senate and of the offer of testimony made by Mr. O'Conor and objected to by Mr. Evarts." The vote upon this and the motion submitted by Judge Miller is not reported.

Mr. Merrick of Washington made the opening argument of counsel for the Democrats. He first discussed the powers of the Commission. He asserted that the Commission, having the power for such purposes possessed by the two Houses acting separately or together, as the law provided, might investigate the truth of the governor's certificate, and ascertain which are the votes cast by the men *bona fide* chosen or appointed by the States as electors. "Having ascertained what are the votes," he said,"you count those votes, throwing aside whatever ballots you may find that are not votes. * * * We therefore submit that any legitimate evidence going to determine what are the true votes cast by the electors duly appointed by the

[2] Ib. 78, 82, 85.

State is proper and competent evidence before this tribunal."

As an important precedent for contending that, notwithstanding the day had passed upon which electors were by law directed to vote, the Federal counting power could by evidence inquire whether those claiming to vote had been by *the law of the State* legally chosen, Merrick cited the evidence and the report of the committee sent out to learn the facts concerning the men who claimed to be the electors of Louisiana prior to the count of 1873. That Republican committee, of which Senator Morton, one of the Commission, was chairman, went behind the returns of the State canvassing board and inquired whether it had acted pursuant to the requirements of the State law. Reporting Feb. 10, 1873, this committee declared: "We find that the official returns of the election of the electors, from the various parishes of Louisiana, had never been counted by anybody having authority to count them." [3] Having separately acted upon this report and the accompanying evidence, each House—in the Senate upon the motion of Carpenter of Wisconsin and in the House upon the motion of James A. Garfield of Ohio—by large majorities refused to count the electoral vote of Louisiana.

Florida presented a much stronger claim for the rejection of the Hayes electoral votes. Said Mr. Merrick:

"But, may it please your honors, in the case of the State of Florida we shall not ask for evidence going behind the certificate. The case presents itself to the court in a peculiar aspect. The evidence which we

[3] Cong. Globe, pt. 2, 1218: 42 Cong., 3d sess.

shall offer and which we claim to be admissible as to that State, is evidence furnished by the State herself as indicated in the proposition read by the distinguished gentleman with whom I have the honor to be associated, Mr. O'Conor." He then pointed out as had O'Conor that the State, by her *quo warranto,* her mandamus, her legislature, and through her executive, had ascertained that Governor Stearns' certificate was either given in mistake or fraud, and "that the electors to whose votes we object, were not the duly appointed electors of Florida; and, through all her departments of government, Florida therefore comes to the United States Congress and begs that you (for you now exercise that power and it is vested in you) will protect her people from the enormity of having their voice simulated by parties never appointed to speak in her behalf."

Judge Black, also for the Democrats, followed. Upon the main issue, among other things, he said: "There has been much talk here about getting behind the action of the State. I do believe firmly in the sovereign power of the State to appoint any person elector that she pleases, if she does it in the manner prescribed by the legislature; and, after she has made the appointment in that manner, no man has a right to go behind her act and say that it was an appointment not fit to be made. A man, whether he be an officer of the State or an officer of the general government, who undertakes to set aside such an appointment is guilty of a usurpation and his act is utterly void. Therefore, if the governor of the State of Florida, after this appointment of electors was made by the people, undertook to certify that they were not elected and put

somebody else in the place which belonged to them, his act is utterly void and false and fraudulent. We are not going behind the action of the State; we are going behind the fraudulent act of an officer of the State whose act had no validity in it whatever. This is a question of evidence. Who are the electors?" Calling attention to the acts of the State making known this invalidity of Governor Stearns' certificate, Black closed by referring to the "Buckshot war" in Pennsylvania in 1838-39, and the result of the contest, as a precedent to prove that a fraudulent vote can be questioned "even though it came wrapt in the forms of law."[4]

Mr. Matthews opened for the Republicans. He argued that the election of President consists, not of one act, but of a series of acts; that the President is elected by men chosen who have a right to make a selection as well as an election, and that it is a mistake to consider this electoral body as delegates representing a State or the people of a State, as agents accomplishing their will. He said that the manner of the appointment of the electors lay within the control of the State up to the day upon which Congress had provided the electors should vote, and that after that day, the act of appointment, "so far as the State authority is concerned, has passed beyond the limit of its control. It then becomes a Federal act. It then becomes one of those things which pass into the jurisdiction, whatever that may be, of Federal power. It is the deposit of the vote of the elector in the ballot box of the United States, and the Nation takes charge of the ballot box;" and after that time whatever power is exerted must be by the Federal government. He

[4] Proceedings, 96, 98, 100.

said: "I maintain that there is no law, either State or Federal, whereby that [elector's] title can be judicially investigated and determined after he has cast his vote." When the "person appointed, or who appears to have been appointed, having in his possession formal evidence of his appointment," acts, the matter passes beyond the State. The "actual question before this Commission is not which set of electors in Florida received a majority of the popular votes; it is not which set appears from the return of the votes made at the primary voting-places to have had a majority of the votes so returned; it is not which set, by looking at the county returns, appears to have had a majority of the votes so compiled; but it is this: which set, by the actual declaration of the final authority of the State charged with that duty, has become entitled to and clothed by the forms of law with actual incumbency and possession of the office." That final authority he found to be alone in the State canvassing board and as by that board exercised prior to December 6, 1876.[5]

Mr. Stoughton, more widely known, more able, and more weighty with courts, followed. His attention was first directed to a consideration of the jurisdiction and powers of the Commission. He said:

"There are some facts of which this tribunal can take judicial notice. One is, the laws of the State of Florida. What are they in reference to this subject, and what was done in pursuance of them, and what is proposed to be done by testimony—as it is called—for the purpose of overthrowing what was done in pursuance of the laws of that State?

"In the first place, its statute * * * authorized

[5] Ib. 102, 108.

the creation of an ultimate returning board having capacity to certify the number of votes cast for electors and who were elected; and, if that board performed its duty, however crowded with error, however mistaken, however, if you please, tainted by fraud, if that board discharged the duty cast upon it by law, and did ascertain and did declare how many votes for particular sets of electors were cast, and did certify and declare who were the persons elected electors, that ends all inquiry here, assuming that you may go behind the governor's certificate, unless, indeed, you may retreat behind the action of the returning board, the final tribunal for that purpose created by the laws of the State, and ascertain whether it did or did not, according to your judgment, faithfully return the votes cast and faithfully declare who were the persons elected."

Here he read from the Florida statute of 1872, creating the State board and defining its powers, and continued:

"There was committed to this board by that statute a capacity to determine and decide—finally and conclusively—how many lawful votes were cast and who were elected electors * * * Then, may it please your honors, your jurisdiction is to count the electoral votes; your power is in counting to resort to such proof, if any, as the Constitution and laws permit. You are dealing with a delicate subject when the question of jurisdiction is reached. You are dealing with the supremacy of a State when you undertake to touch its final tribunal for the purpose of overhauling and upsetting its action. * * *"

Briefly he discussed the *quo warranto,* and the sub-

sequent acts of the legislature, contending that the acts of the Hayes men were those of *de facto officers*, and could not be invalidated by "subsequent judicial action or *ex post facto* legislation," and in conclusion said:

"The alleged fault of the lawful returning board was not fraud—at which my friends are so shocked—but mistake. After electors are thus appointed lawfully, but possibly by a mistaken view of the law by the board declaring their election, its conclusion must forever stand."[6]

Hon. William M. Evarts, yet more distinguished, with the prestige of an international reputation behind him, in sentences rather involved yet adroit, was the next Republican speaker. He added no new argument to what had proceeded. He contended that the Commission could not "entertain any subject of extraneous proof. The process of counting must go on. If a disqualified elector has passed the observation of the voters in the State, passed the observation of any sentinels or safeguards that may have been provided in the State law; when these are all overpassed and the vote stands on the presentation and authentication of the Constitution—that is, upon the certificates of the electors themselves and of the governor—it must stand unchallengeable and unimpeachable in the count." He argued that the Commission had no judicial powers, and could neither compel witnesses nor hear their testimony. He contended that the Hayes men were *de facto* officers and, overlooking the applicability of the *quo warranto* where one even theatens to exercise the functions of an office, that the Florida *quo warranto* ad-

[6] Ib. 109 to 112.

mitted the Hayes men to be in possession and exercise of the office of electors.

Under the Federal Constitution, he argued "in the first place, the only transaction of choosing a President begins with the deposit, so to speak, in the Federal urn of the votes of certain persons named and described in the Constitution as electors. From the moment of that deposit the sealed vote lies protected against destruction or corruption in the deposit provided for it, the possession of Federal officers in Federal offices. The only other step, after that, is the opening of those votes and their counting. All that precedes that deposit of the votes by electors relates to their acquisition of the qualifications which the Constitution prescribes. These qualifications are nothing but *appointment by the State,* and with that the act of Congress and the Federal Constitution, with due reverence to State authority, do not interfere. * * *

"These electors, not being marked and designated by any but political methods, are by the Constitution made dependent for their qualifications upon the action of the State. If the State does not act there are no qualified electors. If the State does act, whatever is the be-all and the end-all of the State's action up to the time that the vote is cast is the be-all and the end-all of the qualification of the elector, and he is then a qualified elector depositing his vote to accomplish its purpose, and to be counted when the votes are collected."

He contended that the "end-all" of the State's action under the State law of Florida was reached with the determination of the "political canvass," of which there could be no reconsideration and no judicial review by the Commission, because "every step and stage of that

action, rightly or wrongly, honestly or dishonestly, purely or fraudulently, has conferred qualifications such as the Federal Constitution requires in the appointment by the State through the methods that it has provided."

He offered no new reasons for the Republican position; he gave no light upon his interpretation of the Florida law; he seemed to stand in abject terror of what he called interpolating judicial inquiries "into this scheme of popular sovereignty in its political action," lest it "will make it as intolerable in its working, will so defraud and defeat the popular will, by the nature of the necessary consequence of the judicial intervention, that, at last, the government of the judges will have superseded the sovereignty of the people, and there will be no cure, no recourse but that which the children of Israel had, to pray for a king." [7]

A strange argument for Evarts!! The very facts, which he so diligently sought to keep from the Commission and which he did not attempt to deny, were a powerful contradiction to what might otherwise have been an argument. Surely Evarts the man and citizen, rather than the partizan counsel who piloted the Republican case through all the hearings of the Commission down to the decision of the Oregon controversy, would not prefer the *government of the State canvassing board,* more narrow than courts, without the means of investigation which belonged to courts, and which in its pro-Hayes report actually "superseded the sovereignty of the people!"

Upon this part of the case O'Conor concluded for the Democrats. Proceeding to define the powers of the Commission, he quoted the law creating the Com-

[7] Ib. 117 to 124.

mission which declared that it should have "the same powers, if any, now possessed by the two Houses acting separately or together," and said:

"Now, that no power of any description deserving the name of a power to investigate and define resides in the president of the Senate is most plain from the very words of the Constitution. * * * He has no means of taking testimony * * * and I humbly submit that it is most manifest that he has none but the merest of clerical powers * * * he is to 'open *all* the certificates' * * * But when we come to the prescription that there shall be a count, we are not told that there shall be a count of *all* the certificates, but that there shall be a count of 'the votes.' This, I humbly submit, introduces a necessary implication that somehow and by some authority there shall be made, if necessary, a selection of the actual votes from the mass of papers produced * * * This is left to an implication that it is to be exercised by those who may have occasion to act officially on the electoral vote. * * * The competency of each House to ascertain the truth is unquestionable. Each has complete powers of investigation; they can take proof through their committees or otherwise as to any matter on which they may be obliged to decide * * * Our construction thus recognizes in those two bodies on such a contingency as is here presented full power to do whatever may be needful to the accomplishment of justice."

In answer to the question, "How far are we to go in this case?" he asserted it would be necessary to go no further than "to make a correction of the unlawful extra-judicial acts of the canvassing board." He said

that the *quo warranto* proceeding and all of the subsequent acts upon which the Democrats relied were admissible to show the illegal act of the pro-Hayes claimants and the illegal nature of the State board, pointing out that as State officers the canvassing board was subject to correction by the State, and that the *quo warranto,* commenced in due season, had determined the pro-Hayes report to be utterly void, having annulled it before the time for the count of the electoral vote by the Federal power.[8]

Thus the issues were made, and the evidence by which the Democrats proposed to sustain their positions was clearly indicated. The Commission met in secret session and debated among themselves for several hours. There is no record of those debates; and the only record we have of the views expressed by the members is left us in their several opinions in which most of them expressed themselves on all the questions involved. The next light we have upon the proceedings is when Judge Miller moved that the Commission order:

"That no evidence will be received or considered by the Commission which was not submitted to the joint convention of the two Houses by the president of the Senate with the different certificates, except such as relates to the eligibility of F. C. Humphries, one of the electors."

By vote of eight Republicans to the seven Democrats, the motion was sustained.

Partizan, indefinite in language as to what evidence was submitted to the joint convention, a viola-

[8]Ib. 124 to 126. See *The Nation,* February 8, 1877, p. 84, for a contemporary appreciation of O'Conor's powerful speech.

tion of Congressional precedents, this order clearly foreshadowed the end.

Its *partizan* nature for one thing is shown in this:

The peculiar language used by Judge Miller in this order that "no evidence will be received," except such as relates to the eligibility of F. C. Humphries, "one of the electors," placed the Democrats on the Commission in an unfair position. If they voted for that resolution, they voted for the language which stated that Humphries was *"one of the electors."* In voting against it, it left the matter unavoidably indefinite as to what evidence they wished the Commission to hear and has left them in a position which some writers misrepresent as a desire on their part to use the power of Congress to override State action. But, believing as they did that no action of the sovereign power of the State of Florida had determinedHumphries to be *"one of the electors,"* they could not support a resolution from which any inference whatever could be drawn to the effect that they did not rely fully upon what are termed the subsequent acts of the State and upon the position that the pro-Hayes report of the State board was not the act of the State. On the other hand, the inconsistency of the Republicans is shown in their action on the very next motion. Commissioner Abbott, immediately following the vote upon the above resolution, moved: "That in the case of Florida the Commission will receive evidence relating to the eligibility of Frederick C. Humphries, one of the persons named in certificate No. 1, as an elector."[9] Whereupon all the Republicans except Bradley voted in the negative. There is a vast difference between the two state-

[9] Proceedings, 139.

ments, and why all the Republicans but the one should have voted against Abbott's resolution, for other than the most inexcusable partizan reasons, I cannot see. The Abbott resolution left the question whether Humphries was "one of the electors" open without expressing an opinion, since the eligibility as an elector is quite distinct from the question as to whether one is an elector. Then, the resolution as proposed by Judge Miller and sustained by the Republicans, in its use of the words "one of the electors" as to Humphries, was entirely untimely, for the case as to who were electors had not yet been presented upon its full merits, and the argument was not concluded for two days thereafter.

V.

The Final Majority Decision.

WHEN the Commission, having entered the order concerning the evidence, again convened on February 8, George Hoadly of Ohio, Ashbel Green of New Jersey, and William C. Whitney of New York, appeared for the Democrats along with the counsel theretofore present. The evidence concerning Humphreys was heard; Hoadly and Green then argued the whole case for the Democrats, and Shellabarger and Evarts for the Republicans. Judge Hoadly made a learned argument inquiring for the right of the Federal counting power to question the eligibility of electors. Green followed, presenting a very clear and forcible survey of the papers before the Commission that had been certified by the president of the Senate. Shellabarger and Evarts replied for the Republicans, and Merrick, for the Democrats, closed the discussion,—and the Florida Case went for the last time into the secret councils of the Commission. Since these concluding arguments developed no change of position on the part of counsel, we now pass to a consideration of the final decision.

It was February 9 when the decision was put into writing, signed by the eight Republicans concurring therein, and transmitted to the president of the Senate. Reciting the caption of the act under which the Commission sat, the report is in these words: "The Electoral Commission mentioned in said act, having received

certain certificates and papers purporting to be certificates, and papers accompanying the same, of the electoral votes from the State of Florida, and the objections thereto submitted to it under said act, now report that it has duly considered the same, pursuant to said act, and has decided, and does hereby decide, that the votes of Frederick C. Humphreys, Charles H. Pearce, William H. Holden, and Thomas W. Long, named in the certificate of M. L. Stearns, governor of said State, which votes are certified by said persons, as appears by the certificate submitted to the Commission as aforesaid, and marked 'number one' by said Commission, and herewith returned, are the votes provided for by the Constitution of the United States, and that the same are lawfullly to be counted as therein certified, namely: four (4) votes for Rutherford B. Hayes, of the State of Ohio, for President, and four (4) votes for William A. Wheeler, of the State of New York, for Vice-President.

"The Commission has also decided, and hereby decides and reports, that the four persons first before named were duly appointed electors in and by said State of Florida.

"The ground of this decision, stated briefly, as required by said act, is as follows:

"That it is not competent under the Constitution and the law, as it existed at the date of the passage of said act, to go into evidence *aliunde* the papers opened by the president of the Senate in the presence of the two Houses to prove that other persons than those regularly certified to by the governor of the State of Florida, in and according to the determination and declaration of their appointment by the board of State

canvassers of said State prior to the time required for the performance of their duties, had been appointed electors, or by counterproof to show that they had not, and that all proceedings of the courts or acts of the legislature or of executive of Florida subsequent to the casting of the votes of the electors on the prescribed day, are inadmissible for any such purpose.

"As to the objection made to the eligibility of Mr. Humphreys, the Commission is of opinion that, without reference to the question of the effect of the vote of an ineligible elector, the evidence does not show that he held the office of shipping-commissioner on the day when the electors were appointed.

"The Commission has also decided, and does hereby decide and report, that, as a consequence of the foregoing, and upon the grounds before stated, neither of the papers purporting to be certificates of the electoral votes of said State of Florida, numbered two (2) and three (3) by the Commission, and herewith returned, are the certificates or the votes provided by the Constitution of the United States, and that they ought not to be counted as such."[1]

What the report gives as "ground" is hardly *ground*—more properly it is the conclusion reached in arguing from the ground or major premise upon which the majority based its reasoning. The true ground, of vital importance in reaching the legal value of the decision, can only be learned by an examination of the individual opinions filed by the several members of the Commission. From these it will be seen that what some historians claim is the true ground of the decision is misleading; and that the real ground lies

[1] Proceedings, 196.

behind the question *why* the specified evidence was held to be incompetent.

It is striking that no reasons whatever are given for the decision reached upon what the majority held to be competent evidence. Why the majority regarded the certificate of Governor Stearns as of more dignity that that of the attorney-general; and why the "determination and declaration of the" appointment of the Hayes electors by the board of State canvassers, was regarded as having unimpeachable dignity and was credited with elective power, is nowhere intimated in the majority report.

To get at the real ground upon which the majority professed to stand, we must read the decision in the light of the opinions and arguments filed by those who therein concurred.

As between the certificate of the governor and the attorney-general, Judge Strong said that the latter had no power to certify that the Tilden men were electors.[2] That is, he agreed with the contention of counsel and the objectors that there was "no executive authority" in the attorney-general. Frelinghuysen said the attorney general's "certificate has in law no more validity than a letter from any other citizen of Florida would have, and cannot be recognized by this Commission."[3]

This conclusion, it must be kept in mind, was reached by an interpretation of the laws of Florida. There was no other source from which and no other way by which it could be known what were the powers of the attorney-general. The correctness of the Republican position on this point will be examined in a subsequent

[2] Ib. 999.
[3] Ib. 850.

chapter, "The Executive Authority of Florida." This question arises upon the papers which the Commission held to be properly before them, and upon which they rested their decision.

Next, why was no evidence *"aliunde* the papers opened by the president of the Senate in the presence of the two Houses" admissible to prove that other persons were electors rather than those certified by Governor Stearns "in and according to the determination and declaration of" the State canvassing board made prior to the time when the electors were, by the Federal law, required to vote? Why were the proceedings of the courts and acts of the legislature and of the executive of Florida subsequent to the day prescribed for the voting of the electors, inadmissible to show that the finding of the State board upon which Governor Stearns rested his certificate, was illegal, a usurpation, and not the act of the State? What were the reasons assigned by the Republicans for holding that the pro-Hayes report of the State canvassing board was conclusive against the world?

Garfield held that the authority in the State to appoint electors carried with it the power to provide the mode, as by popular election, and also to "provide by what means the result of such election may be verified and declared," and that the laws of Florida had made the provision, vesting in the State board of canvassers the right of "final determination and declaration of the result." Interpreting the State law so as thus to lodge the final power, the inevitable conclusion was that the pro-Hayes report of the State board was final as against the State, whether acting through her judicial agencies or otherwise; and, hence, "the final determination of

the result of the election having been declared by the authority empowered to determine and declare it, that act becomes the act of the State."

This conclusion was Garfield's interpretation of the Florida law as found in section four of the act of February 27, 1872.[4]

Strong said that a State "may provide in any way to purify her elections, and may devise means to correct an erroneous canvass, or throw out illegal votes. She may do this in the most summary way. She may accomplish it completely before the day for casting the electoral vote arrives. * * * [But] in all elections there are and there must be finalities. There must be an ultimate canvass and ascertainment of the result. That must be final and conclusive until reversed, though it may not be in exact accordance with the actual facts.

"The Florida statute provides that its presidential electors shall be appointed by a popular vote, and it directs that the result of that vote shall be *determined* and *declared* by a State board of canvassers constituted as directed. That board is made by the statute the ultimate determinant and declarant of what the vote was and of its results, and it has power in certain cases to exclude county returns. The board is to *determine* and to *declare*. Such is the plain direction of the act. * * *

"I admit the declaration and determination of the board may be set aside by any authority the State may designate to try contested elections. It may be shown to be erroneous on the trial of a *quo warranto*. But

[4] Ib. 963, 966.

until thus reversed it is and must be final, obligatory upon the governor as upon all others."

Such being, in Judge Strong's opinion, the Florida law, and since the *quo warranto* had not been concluded and the other acts of the State upon which the Democrats relied provided, before the day upon which the Hayes men claimed to have cast the electoral vote of the State, he took the ground that they had "all the insignia of title;" that is, they had the governor's certificate and what Strong held to be "the judicial determination and declaration of the State canvassing board that they had been elected." Therefore, he reasoned, "having at the time of their action all the evidences of right known to the law," theirs was "an act rightfully done" and must stand unquestionable.[5]

Hence Judge Strong's interpretation of this same Florida law vests in the board of State canvassers:

1. The judicial power they exercised in reaching the pro-Hayes report;

2. That the board by the statute law is the *ultimate determinant* and *declarant* of the result of the popular election.

Upon the ground as thus deduced he held that the subsequent acts of Florida were inadmissible and not competent to show anything contradicting the authority of the Hayes men and showing the invalidity and illegality of all they had assumed to do.

Judge Miller also quoted the law of February 27, 1872, and held that it empowered the State board to review and reject "the poll of any voting precinct;" that it had more than mere ministerial power; and,

[5] Ib. 997-999.

since the board had exercised judicial power in reaching its pro-Hayes report, notwithstanding that in so doing it had actually rejected the entire poll of several precincts, the person named by it in the certificate of the result "is from that moment a duly appointed elector,"—*because,* on *the ground,* "the fact of his appointment, that is, his election, has been ascertained and declared by the tribunal, and the only tribunal, to which the duty and power of so declaring has been confided by law."[6]

Therefore Judge Miller concluded that on this ground the pro-Hayes report was final against both the State and the Federal counting power.

Judge Bradley held that the Federal counting power must "ascertain whether the State has made an appointment according to the form prescribed by its laws." Looking for the law and measuring the acts of the State officers thereby, he, too, held that the Commission acting for Congress in counting the electoral votes "are bound to recognize the determination of the State board of canvassers as the act of the State, and as the most authentic evidence of the appointment made by the State; and that while they may go behind the governor's certificate, if necessary, they can only do so for the purpose of ascertaining whether he has truly certified the results to which the board arrived. They cannot sit as a court of appeals on the action of that board."

This conclusion of Bradley is on the *ground* that the action of the board "involved the exercise of decision and judgment * * * a decision quasi-judicial." So he argued that neither the Federal counting power nor the State by *quo warranto* or otherwise could ques-

[6] Ib. 1008, 1010.

tion the determination of the board, because "to correct the finding of the board, therefore, would not be to correct the mere statement of fact, but to reverse the decision and determination of a tribunal."[7]

Hoar said: "It is true *votes* are to be counted [i. e., the electoral votes]. But it is the votes of those persons whom the proper authority has determined and certified were entitled to cast them." He held that the proper authority to determine and certify who were entitled to cast the electoral votes, lay entirely in the State board; and that the statute of the State vested this power in the board subject to no review. He admitted that there could be no question of *de facto* action, since neither set of claimants was "more fully clothed with the office than their competitors. "Each of the sets of electors who claimed to have cast their votes in Florida did everything which was necessary to the entire execution of the office of presidential elector."[8]

I have permitted the participants—the objectors, the counsel, and the Commissioners—to define the issues and to set forth the grounds of their conclusions in their own words because of the fact that even the Republicans themselves and some writers since are incorrect in their assertions as to the ground of the majority decision. As I pointed out when presenting the arguments of counsel, the issue was as to where the State law lodged the power to act finally for the State in ascertaining who had been appointed electors; and when, with reference to the day on which the Federal law required the electors to vote, the final steps

[7] Ib.1022, 1024.
[8] Ib. 956, 958.

might be taken by the State; and, last, by what should and must the Federal counting power, in the case before us, the Commission, be led to know the law of the State that defined the credentials of the true electors.

When Senator Hoar in his "Autobiography of Seventy Years" says: "The simple doctrine on which the Commission proceeded was that the right to determine absolutely and finally who are the duly chosen presidential electors is committed by the Constitution to the States,"[9] he does not give an intimation as to the true ground upon which the Republican majority acted. His statement is misleading at least to the casual reader. Yet it is representative of assertions made in reference to this question by his party, and by members of the Commission.

James Ford Rhodes, in his most recent history of this subject, follows the empty claims of the Republican majority,—"steals the livery of the court of heaven in which to serve the devil," as Abbott aptly put it in his argument in the secret session of the Commission. Dr. Rhodes says that it is remarkable how ardently the former opponents of States' rights argued for them. Then he continues:

"On the other hand the Democrats were equally inconsistent. As a party they had been defenders of State's rights and their Southern wing had carried the doctrine to a bitter extremity, but now they invoked the power of Congress to override State action and right a grievous injustice committed by what they had formerly maintained was a sovereign authority."[10]

[9] Vol. 1, 378.

[10] 7 History of the United States, 240.

As to the position of the Democrats, the very reverse is true. The Democrats asked the Federal counting-power to accept as final the adjudication of the State as "the valid or lawful certification or authenication" of the Florida electors as that adjudication was expressed by the judgment in a *quo warranto,* and confirmed by an act of the Florida legislature. Or, *should this be refused,* should the Commission hold that it had power to determine what it would recognize as the elector's credentials, *then* the Democrats asked the Federal power *to take that as the action of the State which had been done according to the State law,* according to the manner provided by her,—*as her high courts interpreted and enforced it;* that that *interpretation* defining the provided manner of the choice, given *by the State herself,* be taken as the law—the definition of the elector's credential; since a law is none other than its interpretation and application to the facts. For this interpretation the Democrats pointed to decisions of the State's highest courts, the settled enforcement of those decisions, the opinion of the court in the mandamus in this case, and to the common law applicable to the situation and in force in Florida. The injustice of which the Democrats complained had not been committed by "State action," they proposed by these means to show. The power of Congress was invoked by the Democrats "to override" nothing done by the State. The power of Congress, in proceeding to count the electoral votes, was asked to *recognize* "the sovereign authority" of the State of Florida.

The Republicans insisted that the Federal power should ignore or reverse the adjudications of the State

courts and their legislative confirmation. Then, having treated these as not the act of the State, they insisted that the Commission, as in fact it admitted it must do, should interpret the local State laws and determine therefrom where resided the State's sovereign power; and that the power of Congress should be exercised to weigh the various acts of the State and those who claimed to act for her, and from them determine, regardless of State action with reference thereto and heedless of her interpretation thereof, which act constituted the act of the State and an exercise of her sovereign power. By thus interpreting her laws and measuring certain acts, the Republicans sustained the pro-Hayes report of the State canvassing board, holding that it had been made in conformity to the State law, and that that action had become the act of the State under the law of 1872, which defined the functions of the State board. Thus the Stearns certificate was sustained and the Hayes electoral votes counted. And this was done, permit me to repeat, not by construing or interpreting and applying any Federal law or any part of the United States Constitution; for, as General Lew Wallace stated in his report of the proceedings before the State board, the legality and validity of the board's action must be determined entirely by the local statute of the State.[11] The construction given by the majority of the Commission, acting for Congress, as I have said and as I hope fully to show, was entirely at variance with the settled law and construction as long recognized by Florida. It was the Republicans "who invoked the power of Congress to override State action," by which they

[11] Wallace, Autobiography, 903, 909.

sustained those who "had committed a grievous injustice."

Just two quotations from Commissioners I put in evidence here for the Democrats upon this point.

Said Thurman:

"I understand it to be asserted by those who claim the election or the appointment of the Hayes electors, that the governor's certificate is not conclusive unless made in accordance with the decision of the canvassing board; * * * This raises the question whether the decision of that board can be impeached. I maintain that it can. * * * It will be found sufficient for the decision of this case that it is impeached for want of jurisdiction in the board to do that which it did; and the effect of which was to change the apparent result of the election. * * *

"Now, upon the county returns it is not denied, and, indeed, appears by evidence already before us and not contradicted that the Tilden electors received a majority of the votes of the people of Florida; and it also appears that it was by throwing out the votes of certain polls or precincts that an apparent majority was shown for the Hayes electors. Had the canvassing board of Florida any authority to throw out those votes? This question has been decided by the highest judicial tribunal of that State, interpreting the statute creating that board and defining its powers. * * * It is perfectly conclusive of the meaning of the statute, as much so as if it were written in the statute in so many words. It follows then that if we are to respect the statute of Florida, which everybody admits must govern the case, the canvassing board, in throwing out the votes for the Tilden electors and thereby giv-

ing an apparent majority for the Hayes electors, acted without jurisdiction, and their act was, therefore, absolutely null and void."[12]

Commissioner Abbott, a Representative from Massachusetts, in concurring with the other Democrats said:

"Let me not be misunderstood. It is claimed by the Senator from Indiana and those agreeing with him, that the doctrine of State rights bars the way to any inquiry into the question whether the persons from any State claiming to cast its vote are the true electors and compels Congress to confine itself merely to counting. I have always been a true and faithful disciple of the great doctrine of State rights. I have always believed in it, and always expect and hope to remain steadfast in my faith. From day to day I am more assured that there is no way known to man by which our government can be preserved, except by the strictest and firmest maintenance of all the rights of the State. I yield to no man in my fidelity to the doctrine of State rights, but I am not willing to carry it to the extent of doing in its name the greatest wrongs to the States, instead of upholding their rights. There never was a clearer case of 'stealing the livery of the court of Heaven to serve the devil in,' than in thus attempting to wrest the doctrine of State rights to excuse and justify this great wrong to States. * * *

"I submit that there is no ground," he continues, "upon which the votes of the Hayes electors can be counted. They were, in fact, never elected. To count their votes would be to set aside the judgment of the supreme court, the legislature, and the governor of the State of Florida; it would be to give to the

[12] Proceedings, 834.

certificate of two ministerial officers, made by law merely *prima facie* evidence, a power and effect and conclusiveness not given to the judgments of the highest courts of law; a result never before heard of in the administration of justice. To count those votes would be to declare elected to the high office of President a person who never received the votes of the people as required by the Constitution, but whose title would depend simply on the illegal, fraudulent action of two State canvassers in Florida. If it were intended to encourage fraud and to show that there was no way known to the law to prevent its perpetration, no better way to do it could be devised." [13]

Thus reasoned and even pleaded all the Democrats.[14]

[13] Ib. 934, 938.

[14] Proceedings: Field, 977; Hunton, 906; Bayard, 873; Clifford, 1056. Payne did not leave any written argument in the Florida case, but he voted with his brother Democrats, and all the way through the proceedings took an active part.

VI.

The Executive Authority of Florida.

NO objection, it will be remembered, to counting the votes of the Tilden men was based upon any charge of fraud. The point raised by the Republicans against the Tilden electors was that their "certificates or papers were not authenticated according to the Constitution and laws of the United States;" that is, they alleged that the certificate of their electoral votes sent to the president of the Senate by the Tilden men, "was not accompanied by any certificate of the executive authority of the State of Florida." This objection was based upon the Federal law of March 1, 1792, which required "the executive authority of each State to cause three lists of the names of the electors of such State, to be made and certified and to be delivered to the electors;" one of these was to be annexed to each of the three certificates of their votes.[1] As we have seen, the certificate of the votes cast by the Tilden men was accompanied, in the first instance, by the certificate of the attorney-general of Florida, certifying to their

[1] On page 733 of the Proceedings, Ashbel Green, of counsel for the Democrats, omits the word "authority" when attempting to give the law of 1792. A glance at the original act, 1 Statutes at Large, 239, 240, shows the omission to be an error. As seen by the quotation from the Revised Statutes, given, for instance, by Mr. Justice Field on page 979 of the Proceedings, the word "authority" was omitted in copying the language of the law of 1792. No one, it seems, compared the words of the compiled work with the original act, and so the full force of the law as undoubtedly meant by those who provided it, was lost, though, of course, in the Revised Statutes the word "authority" is clearly implied.

election. In the second place, the Tilden men presented themselves with a certificate of the governor, the successor of Gov. Stearns, certifying to their election as fully as the law required, but the Republicans objected to the competency of this, first, because they alleged that Gov. Stearns' certificate was "in all respects regular and valid and sufficient under the Constitution and laws of the United States," and showed that no other person or persons than the Hayes men were duly appointed to cast the electoral vote of Florida; and, second, also because they alleged that the governor's certificate, made after the day on which the electors were to vote, "and the proceedings as recited therein as certifying the qualifications of the Tilden men, are *ex post facto* and retroactive."

We shall first examine the objection based upon the claim that the Tilden men had no "certificate of the executive authority of the State of Florida," in its application to the certificate of the attorney-general.

What constituted "the executive authority of the State of Florida?"

It seems generally to have been taken for granted by both the Commission and the counsel that the governor constituted the sole executive officer of Florida. Neither the law of March 1, 1792, upon which the Republicans relied, nor any other Federal law, attempted to define the executive authority of any State. And it will be noticed that the Republicans insisted that the Federal law and Constitution were the sources upon which they based their objections to the sufficiency of the Tilden certificates,—"upon the ground that the said certificates or papers are not authenticated according to the requirements of the Constitution and laws of the

United States, so as to entitle them to be received or read, or votes stated therein, or any of them, to be counted, in the election of President of the United States."[2] Who should exercise "the executive authority of Florida" or where it should be vested, was left to be determined and defined by the local constitution and laws of the State. The Constitution and laws of the United States merely assigned the duty of certifying or causing to be certified the election of the electors, and that such certificates, three in number, should be delivered to each elector, by the "executive authority," leaving the State to determine by whom and how that authority should be exercised.

The Florida constitution of 1868 was the fundamental law of that State at the November election and during the sitting of the Commission. It defines the *executive authority*. Art. VI., section 1, declares that the "supreme executive power shall be vested in a chief magistrate who shall be styled the governor of Florida." This wording suggests the *division* of executive authority that we actually find in the constitution. We find that power vested in different officers, which, of course, have different duties, all indicated by the constitution and the laws pursuant thereto. Notice the language of the Federal Constitution: "The executive power shall be vested in a President of the United States." In the Federal instrument the executive authority is lodged with one officer; in the Florida instrument that power is distributed, being vested in more than one officer. Each instrument defines the nature and extent of the power. Section 17 of this Art. VI. of the constitution of Florida, which defines the "execu-

[2] Proceedings, 26.

tive department," says: "The governor shall be assisted by a cabinet of administrative officers, consisting of a secretary of State, attorney-general, comptroller, treasurer, surveyor-general, superintendant of public instruction, adjutant-general, and commissioner of immigration." Art. VIII. reiterates these executive officers, and concludes by saying that they "shall assist the governor in the performance of his duties." [3]

What were the governor's duties? What were the duties of the attorney-general? The United States law said that the "executive authority" should "cause three lists of the names of the electors to be delivered" to them; that is, the governor, as executive authority, should see that the electors received—not necessarily from his own hand or under his own signature—the evidence of their election; and this they were required to transmit along with the lists of their votes as evidence to the Federal counting power of authenticity and authority. Whatever means the State had provided for the authentication of the votes, it was the governor's duty to have furnished. Said Judge Miller, one of the ablest of the Republican members:

"It is manifestly the duty, and therefore the right, of the State, which is the appointing power, to decide upon the means by which the act of appointment shall be authenticated and certified to the counting power and to the electors who are to act on that authority. To this proposition I have heard no dissent from any quarter. This evidence of appointment must in its very nature vary according to the manner in which the electors are appointed. If elected by the legislature, as they may be, an appropriate mode would be the signa-

[3] Poore, Charters and Constitutions, 351, 355.

tures of the presiding officers of the two Houses to the fact of such appointment, or a certified copy of the act by which they were elected. If appointed by the governor his official certificate with the seal of the State would be an appropriate mode. If elected by popular suffrage, that election should be ascertained and authenticated in the mode which the law of the State prescribed for that purpose." [4]

The attorney-general, by the act of the legislature approved February 27, 1872, the law under which the election of November 7, 1876, was held, was made a member of the State canvassing board. Section four says:

"On the thirty-fifth day after holding any general or special election for any State officer, member of the legislature or Representative in Congress, or sooner if the returns shall have been received from the several counties wherein elections shall have been held, the secretary of State, attorney-general, and comptroller of public accounts, or any two of them, shall meet at the office of the secretary of State pursuant to notice to be given by the secretary of State, and form a board of State canvassers, and proceed to canvass the returns of said election, and determine and declare who shall have been elected to any such office, or any such member, as shown by said returns." [5]

One branch of the executive authority, therefore, ascertained who had been elected; it was the governor's duty to see that a certificate of the result shown by the returns reach the electors. If he made the certificate himself as the Florida act of Aug. 6, 1868, had au-

[4] Proceedings, 1010.

[5] Laws of Fla., 1872, p. 19.

thorized, he could only base it upon the information furnished by the canvassing board. His information was secondary, while that of every member of the State canvassing board as to the men shown by the returns before them to have been elected was primary and direct. For this reason, among others, the Republicans admitted that it was proper to go behind Governor Stearns' certificate and see upon what facts, if any, he had based it. "If a certificate is based on anything else than the legal evidence, it is without legal validity, and that without regard to whether fraudulently, ignorantly, or a mere *casus omissus*," [6] was the admittedly applicable rule for testing the certificate of the governor. Said Stoughton, of counsel for the Republicans, the distinguished New York lawyer: "Undoubtedly, upon questions of forgery, upon questions of mistake, upon many questions, this tribunal could deal" with "the governor's certificate." [7] Said Bradley, "the fifteenth man:" "I consider the governor's certificate of the result of the canvass as *prima facie* evidence of that fact, but subject to examination and contradiction." [8] And again: "While it must he held as a document of high nature, not to be lightly questioned, it seems to me that a State ought not to be deprived of its vote by a clear mistake of fact inadvertently contained in the governor's certificate, or (if such case may be supposed) by a wilfully false statement. It has not the full sanctity which belongs to a court of record, or which. in my judgment, be-

[6] 2 Ells, 433, Chester H. Rowell, Dig. Contested Elec. Cases, 660.

[7] Proceedings, 112.

[8] Ib. 1030.

longs to the proceedings and recorded acts of the final board of canvassers."[9] And Republican Commissioner Strong: "I admit that the governor's certificate is not unimpeachable."[10]

In 1868 the supreme court of Florida, in *State* vs. *Gleason*, said:

"The attorney-general is the legal guardian of the people * * * his duties pertain to the executive department of the State, and it is *his duty* to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises."[11] And the attorney-general, conscious of his high duties, himself recognized that he was part of the executive authority of his State.[12]

Under the laws of his State, which defined the duties of all officers thereof, the attorney-general could not have refused to give his certificate without perjuring himself. His knowledge of the facts and his view of the law gave the *occasion* indicated by the supreme court when it declared that the duty of the attorney-general was "to use means most effectual to the enforcement of the laws, and the protection of the people."

Now, since the attorney-general was by the constitution and law a part of the executive authority of Florida, and had been so recognized by the courts long before 1876; and since it was a part of his executive duty to *know of his own* inspection and count of the

[9] Ib. 1023.

[10] Ib. 998.

[11] 12 Fla. 190, 212.

[12] Sen. Rep. 611, Evidence, 35: 44 Cong., 2nd sess.

returns who had been elected, I submit two conclusions follow: 1. The attorney-general's certificate was from and by the executive authority of Florida; 2. Being executive authority and issued upon direct and primary information as to what the returns showed, and issued in discharge of a legal duty, issued for the protection of the people and for the maintenance of the majority voice of the voters of the State, it was sufficient to indicate that Governor Stearns' certificate was based upon something that was either a fraud or a usurpation or a mistake. Its least proper weight necessitated the admission of evidence excluded from the record upon which the Republicans left their decision; being the certificate of the executive authority of Florida, it was, under the State law and under the Federal Constitution, of no less dignity than that of the governor and amply counterbalanced his authentication.

Upon the record, therefore, the objection that the Tilden men's votes were not accompanied by any certificate of the executive authority of the State of Florida, is without warrant in the facts and wanting in legal validity. This is the first serious legal *defect* in the majority decision, and affects the validity of Mr. Hayes' title. A study of the facts in relation to the *quo warranto* and mandamus actions will develop, I submit, even graver legal errors.

Before entering these latter subjects, to make the historical story complete we need to notice a little more fully the result of the inquiry into the eligibility of Humphreys. He appeared in person as a witness before the Commission, admitted holding the office of United States shipping-commissioner, and stated that

he had resigned as such officer, and exhibited letters tending to show that his resignation had been accepted October 5, 1876, by Judge W. B. Woods, the judge of the United States circuit court for the northern district of Florida. It was in this court in open session that the appointment was made. The resignation had been mailed to Judge Woods and received by him while visiting in Newark, Ohio, and from the latter point Judge Woods had written and mailed what purported to be an acceptance of the resignation. The Democrats claimed that this act was not a valid acceptance, but was the act of an individual and not the act of the court. Judge Woods admitted that he could fill the office only while actually holding court; and it was insisted that the resignation could be accepted by the court only when in legal session.[13]

After the matter had been fully considered, Thurman, as mentioned in the preceding chapter, offered the resolution: "That F. C. Humphreys was not a United States shipping-commissioner on the 7th day of November, 1876." Then the record says, "After debate, Mr. Commissioner Thurman withdrew his resolution." What the Democrats of the Commission, other than Thurman, thought as to Humphrey's eligibility there is nothing in the proceedings to show.

That all the Democrats regarded Humphreys as eligible, a question entirely apart from whether or not he had been elected, I feel sure; for the conclusion embodied in Thurman's resolution, in the light of the evidence, is at least supported by the equity of the matter. There is important authority in America that an officer may resign at pleasure without the assent

[13] Proceedings, 186.

of the appointing power, although this doctrine is not supported by perhaps a majority of cases. By the acts of April 10, 1869, and of March 3, 1871, the power and jurisdiction of Federal circuit judges are limited to their respective circuits.[14] Outside of his district and in Ohio, Judge Woods had no official power. The "general doctrine is that all judicial business must be transacted in court," and therefore the attorneys who argued that the act of Judge Woods in attempting to accept the resignation while in Ohio, was the act of an individual and not that of a judge, is supported by good authority.[15] But Humphreys had at least meant to resign, had ceased to use the office, and had in all good faith become a candidate for Presidential elector. If he were elected his vote was properly counted, under the circumstances. The case in its real merits, in my opinion, rests on the question as to his election.

Had the Commission gone into a hearing of the evidence that had been gathered by the Congressional committee and that the Democrats asked the Commission to consider, a far more serious difficulty would have been encountered as to the eligibility of another one of the Hayes claimants, C. H. Pearce. Although the facts upon which it was claimed that Pearce was ineligible as an elector were contained in this report and the evidence accompanying it made by a committee, whose majority was Republican, sent out by the Senate for the purpose of gathering the facts concerning the electors, or those who claimed to be electors, and although this report and its accompanying

[14] 4 Fed. St. Anno., 39, 16 St. L. 44, 494.

[15] 19 Am. & Eng. Enc. Law, 562 s; 4 Enc. Pl. & Pr. 337.

evidence was submitted to the Commission by Shellabarger, one of the Republican counsel, and had been taken as part of the Republican statement,[16] the facts were never considered by the Commission,—except in so far as they were a part of the evidence rejected by the Republican majority.

Before the election Pearce had been convicted in the Florida courts of felony. He had been found guilty of "corruptly offering a sum of money to a legislative officer of the State of Florida,"—a bold attempt at the most unpardonable bribery, than which few crimes are more reprehensible.

He had, previous to the election, been pardoned, at least *prima facie;* but it was claimed that he had not been restored to civic rights, since under the laws of Florida, as is true in other States, one convicted of felony is deprived of his right to hold office or to vote.[17] Prior to that time the United States Supreme Court in *United States* vs. *Wilson,* 7 Peters, 150, had held that a mere pardon does not restore to civic rights.[18]

However, so far as the will of the people of Florida is concerned, the right or the wrong of counting the votes of these Republicans, rests on the fact of *bona fide* appointment by the State.

[16] Proceedings, 53.

[17] Senate Report 611, Minority Report, 13: 44 Cong., 2nd sess; 14 Fla., 153, where Pearce's case is fully reviewed by the supreme court of Florida.

[18] See also Virginia supreme court, 2 Leigh, 724; and the Illinois court, Foreman et al *vs.* Baldwin, 24 Ill. 298.

VII.

The Hayes Usurpers.
The Florida Quo Warranto Proceeding.

THE Republican majority of the Commission decided that it was not competent under the Constitution and the law to admit the "proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day" to question "the determination and declaration" of the board of State canvassers made by that board before the day upon which the electors were by law directed to perform their duty. The Democrats insisted most earnestly upon both the competency and sufficiency of this evidence thus ignored. To these respective positions, involving what are known as the States' subsequent acts regarded by the Commission as *aliunde* the papers opened by the president of the Senate in the presence of the two Houses, we now direct our attention.

Shellabarger, eloquent and full of bold fire, made a representative assault upon the Democratic position. He insisted: "Therefore every act of the State in the way of exercising power must be 'appointment' and 'appointment' in the very nature of the case cannot follow the day when the first and the last and the only act of the functionary must, by the Constitution and the law, be completely and forever discharged. Is it not plain, therefore, thus far, that it was the design of the Constitution, is the express requirement of the

Constitution, that every act of the State, being all appointment and appointment only, shall antedate the vote?"

Commissioner Thurman, since well-known as the Democratic Vice-Presidential candidate, formerly chief justice of the supreme court of Ohio, interrupted with a question representative of the Democratic and what is believed to be the true ground: "Suppose," asked Senator Thurman, "it be granted that every act which constitutes the appointment must be done before the day when the electors cast their votes, does it follow that there can be no inquiry afterwards as to whether there was any appointment made?"

"That is a fair question," replied Attorney Shellabarger. "It deserves a fair, frank, and square answer, and I shall make it as I proceed as well as I can."

Watch his argument. Proceeding with his answer, he says: "If an elector on the voting day is endowed with all the insignia of right, with all the apparent title of office that can, according to the then existing State machinery, he held on that day, he is, to every possible legal intent, *as against the State,* the elector both *de facto* and *de jure.* * * * I wish to state it with the utmost care about my words—when that political transaction by the State has been discharged according to the requirements of the law of the State as it existed upon the day of voting, then the power of the State over the subject-matter is an accomplished process of government on the part of the State, and the power of the State over the subject-matter has passed forever away."[1]

Constantly and in every conceivable form this argu-

[1] Proceedings, 167, 172.

ment was repeated by the Republicans. The argument is a *petitio principii.*

Had the Hayes men *"insignia of right?"* Whether the Hayes claimants were usurpers or men having "all the insignia of right," depended upon what the "existing machinery" made it proper to be done so as to give even "apparent title of office." The argument is fatal in that it ignores the "apparent title of office" held "on the voting day" by the Tilden claimants. The argument is erroneous in that it assumes that the acts of the Hayes claimants and of the pro-Hayes canvassing board constituted the "political transaction by the State." What were "the *requirements of the law of the State as it existed upon the day of voting?"* Certainly it is true that if the acts of the Hayes men constituted the State's *political transaction,* we may concede that then there had been an "accomplished process of government." But the Democrats insisted that the acts of the Hayes claimants had not become the State's political transactions; that they were usurpers, and had not acted according to the requirements of the law of the State as it existed before and on the day of voting. The Democrats argued that what the Hayes men claimed to be an "insignia of right," was null, void, and of no force whatever. The Democrats based their claims, among others, upon the ground that the Constitution of the United States guaranteed to each State the common law remedy known as a writ in the nature of a *quo warranto,* or simply the *quo warranto,* its synonymous equivalent, as we often term the action; that that action was then the law of Florida, and that it had been invoked to determine the rights as between the *two sets* of

electoral claimants. They insisted that this remedy, as to which the rights of the State under the Constitution remained unchanged, belonged to the courts of the State; that it was applicable as between the Hayes and Tilden claimants; and that the judgment therein not only determined the rights of the claimants parties thereto, but that that adjudication determined conclusively which acts, if any, of those parties had become and were the acts of the State,—defined as against the world whether or not, and if so wherein, there had been a political transaction by the State. And, being definition and determination of *appointment* preceeding, might properly be reached and announced *after* the day upon which electors were required to meet and to vote.

Which contention was correct? A satisfactory answer to this question may be had by determining: (1) What was then the law of *quo warranto* actions as settled in America in general and in Florida in particular. (2) Having found the law, by seeing whether the Federal Constitution denies to a State the right to apply any part thereof to a *quo warranto* proceeding inquiring who had been appointed her electors of President and Vice-President.

First, then, of the action and its scope and time of judgment.

A view of the facts of the case should be clearly seen before we examine the law. Judge Field correctly tells us:

"As soon as it was known that the canvassers had certified to the election of the Hayes electors, the Tilden electors filed an information in the nature of a *quo warranto* against them in one of the circuit

courts of the State, to determine the validity of their respective claims to the office of electors. This proceeding was commenced upon the day on which the canvass was completed, and process was served on the Hayes electors before they had cast their votes. The circuit court had jurisdiction of the proceeding by the constitution of the State, the eighth section of which provides in terms that the circuit court and the judges thereof shall have power to issue writs of *quo warranto*. In the information the Tilden electors alleged that they were lawfully elected to the office of electors, and that the Hayes electors were not thus elected, but were usurpers. The Hayes electors appeared to the writ, and, first upon demurrer, and afterwards upon an investigation of the facts, their right to act as electors was determined. And it was adjudged that the Hayes electors were never appointed, and were never entitled to assume and exercise the functions of that office, and were usurpers; but that the Tilden electors were duly appointed at the election on the 7th of November, and were entitled on the 6th of December to receive certificates of election, and on that day and ever since, to exercise the powers and perform the duties of that office."

The writ, let the reader remember, for it is important in a legal aspect, was served upon the Hayes men before their vote, but after they had attempted to exercise the functions of the office of electors. They appeared to the writ, and the questions raised were fought before the courts until final judgment by the supreme court of the State, which was rendered before the Federal count. The best obtainable local and visiting counsel appeared in the case. General Lew

Wallace, as the special counsel for the National Republican committee, led the fight for the Republicans, appearing personally in the case both before the circuit court and before the supreme court, as he afterward stated under oath.[2]

Upon these facts Judge Field, in common with the other Democrats on the Commission, concluded: "That action seems to me to be conclusive of the case, * * * especially when considered in connection with the action of the legislature of the State."[3]

With splendid logic Bayard argued: "There can be no doubt that under the constitution and laws of Florida the court had jurisdiction, had the parties before it, and entered judgment in accordance with the law and the facts. This proceeding was commenced on the day on which both sets of electors assumed to act, on which day the board of canvassers rendered a decision which was declared by the courts to be erroneous and fraudulent, but which did not prevent the true electors from acting upon the fact of their election and casting the votes according to the Constitution and the laws of the United States. There was in this case no retroactive force of law. The fact had been determined on the 7th of November, 1876, by the citizens of Florida at the polls, who were the electors; the function of electors was discharged by those whom that election has proven to have been elected on the 6th day of December. It is no case, as has been suggested, of reconsideration by the tribunals and legislature of a State, changing the result of an election; it is no question of violation of the requirements

[2] Ho. Miscl. Doc. No. 31, p. 516: 45 Cong., 3rd sess.

[3] Proceedings, 983.

of the Constitution that the votes should all be cast on the same day through the United States. The votes were cast on the day named by the act of Congress, and shall it be because some false votes were cast by pretended electors on the same day that the true votes were cast by the real electors, that, therefore, the action of the latter is to be nugatory? There is no want of performance of every constitutional and legal requirement by Call and his three associates, the Tilden electors. By the judgment of the courts of Florida the fact is conclusively fastened upon the knowledge of this tribunal, and its effect is binding upon them, that on the 7th day of November, 1876, Wilkinson Call and his three associates were duly and truly chosen, in the manner prescribed by the legislature of the State of Florida, electors for President and Vice-President, and that on December 6, 1876, they lawfully performed the functions of their said office, which they certified duly to the two Houses of Congress."

Upon these facts, then, let us find the laws governing *quo warranto* in its application to electors of President and Vice-President.

The writ of *quo warranto* comes to us through the common law from England. It originated in 1198, during the reign of Richard I. In the course of time the procedure underwent some change and came to be known as "the information in the nature of a *quo warranto.*" This latter is the form of the writ now used in England and in the States of the United States. In America "quo warranto" and "writ in the nature of a quo warranto," are used as "synonymous and convertible, the object and end of each being sub-

stantially the same."[4] This construction was held in terms by the Florida court at least as early as 1868.[5] The purpose of the action is to correct the "usurpation of a public office or corporate franchise by trying the right and ousting the usurper."[6] As High, a well-known legal authority, tells us, this procedure is "employed to test the actual right to an office or franchise."[7] Its purpose is not to correct wrongs by an officer, or one who claims to be an officer, nor is it applicable "where a public officer threatens to exercise power not conferred upon him by law." There must be some use of the function or right claimed, before the grounds upon which the writ can be invoked shall have been complete. In such cases, as expressed by one of our latest standard authorities, the action lies "either where a person has usurped an office, a franchise, or a liberty, or where, having had such office or franchise he has by non-user or abuse forfeited it."[8]

In Florida, as well as Arkansas, California, Connecticut, Dakotas, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, and England, there are scores of unbroken decisions establishing beyond dispute that a *quo warranto* or "an information

[4] 17 Enc. Pl. and Prac. 383.

[5] State *vs.* Gleason, 12 Fla., 190, 208.

[6] Com. *vs.* Murray, 11 S. & R. (Pa.), 73; 14 Am. Dec., 614; State *vs.* Portland, &c., 58 N. H., 113.

[7] Ext. Legal Rem., 2nd ed., sec. 618.

[8] 17 Enc. Pl. & Pr., 393; Atty.-Gen. *vs.* Salem, 103 Mass., 139; People vs. Bristol, 23 Wend. (N. Y.), 223.

in the nature thereof, is the proper remedy to try the title to a public office against one who usurps the same and to oust the usurper."[9] This action "lies against a person claiming an office under a commission from the governor," no less than in cases where the authority under which the office is held comes directly from the people.[10]

There can, therefore, be no question that the proceeding in the nature of a *quo warranto,* which was employed to test the question of title as between the Tilden and Hayes claimants, was the correct remedy. It not only belonged to the common law[11] and became the common heritage of the American States, but it belonged to the courts of Florida by specific authority of her constitution, and had been long the machinery recognized by the legislature and courts for the very purposes for which it had been created and so long preserved. Long before the Hayes-Tilden contest the courts of Florida had resorted to the remedy for the correction of wrongs similar to those charged in the case before us. In 1868 the supreme court in the case of the *State* vs. *Gleason* held that a proceeding in the nature of a *quo warranto* was the only remedy known either to the common or statute law of the State for correcting the usurpation of a public office.[12] The court said: "Our legislature has not seen fit to make any change in the common law rule."[13] In 1873 again

[9] 17 Enc. Pl. & Pr., 398; Ames *vs.* Kansas, 111 U. S. 449, cited in Foster *vs.* Kansas, 112 U. S. 206; Sparf *vs.* U. S. 156 U. S. 129; Bachman *vs.* State, 34 Fla. 57.

[10] 17 Enc. Pl. & Pr., 399.

[11] 3 Bla. Com. 263.

[12] 12 Fla., 190, 211.

[13] Ib. 213.

the supreme court of Florida in *Robinson* vs. *Jones,* announcing the rule, said: "The effect of the State Code is simply to affirm and to continue the common law rule as to the right of action, at the same time authorizing that right of action to be asserted through the instrumentality of a civil action under its provisions. We have heretofore held that the Code does not in such a case as this exclude or abolish the remedy by information (in the nature of a *quo warranto.*)" The rule in this respect thus laid down is the settled law of Florida.[14]

It is not a little strange, therefore, in the light of the *quo warranto* law as universally applied in America and as it had been so long settled in Florida, that we find some of the Republicans of the Commission, especially Judge Miller, insisting that this proceeding was not, at any time in this case, the proper remedy.[15] While some of them admitted the remedy, had the judgment been rendered—a physical impossibility under the circumstances—before the claimants to the right of electorship had cast, sealed, and despatched their votes, all of the Republicans united in insisting that the fact that the *quo warranto* judgment was not reached by the court until several days after the claimant-electors had exercised the functions which they claimed to be rightfully theirs, rendered the judgment entirely without validity. It is probable that this contention that the judgment was void because it was "a post hack decision," as they called it, had more weight than any other at the time in leading the public

[14] Robinson *vs.* Jones, 14 Fla. 256; State *vs.* Gleason, 12 Fla. 190; State *vs.* Jones, 16 Fla. 306; State *vs.* Anderson, 26 Fla. 240.

[15] Proceedings, 999, 1008, 1024.

to accept the decision of the Commission as founded upon some show of legal right; yet this contention has no more foundation in law than the assertion that Hayes received a majority of the popular votes in Florida at the election, had in truth.

The right to proceed to judgment after the expiration of the office and after the time when the functions of the office either have been or should have been exercised, always obtains where there is some substantial right to be subserved by such a judgment. Than this no principle in America is more correctly or more firmly settled.[16]

Until the electoral votes of a State have been counted by the Federal counting power, the State yet has a right *in fieri*: the substantial right to have her *bona fide* authoritative votes counted.

Now the *quo warranto* proceeding as applied in this case by Florida, the final determinant procedure under her law in appointing her electors, was "to obtain a judicial declaration and enforcement of existing rights, not to create or destroy them." This is, let us not forget, the prime purpose of the action, as it has been since its origin.[17] The *quo warranto* determined the question: "Which was the political action of the State?" It did not revoke any *act of electors*; it did not attempt to do so; it ascertained whether there had been an act of the State. As pointed out by Commissioner Hunton:

"Although the electors had voted before the judg-

[16] 17 Enc. Pl. & Pr., 485; Com. *vs.* Swasey, 133 Mass. 540; Dean *vs.* Miller (Neb. 1898), 76 N. W. Rep. 555; People *vs.* Rogers, 118 Cal. 394; State *vs.* Pierce, 35 Wis. 101.

[17] 19 Am. Eng. Enc. Law, 663.

ment in *quo warranto,* yet that judgment was rendered in time to instruct us on the point which we are to decide and determine, which set of electors has been duly appointed."[18] The judgment determined which set of votes the *State had the right to have counted.*

In other words, the judgment was rendered in time to oust a fraudulent claim on the one hand, and on the other to give a "judicial declaration of an existing right"—the right of Florida to be represented by the Tilden electors, a right created by the ballot on November 7, 1876, and which, at the rendition of the judgment, was yet to be made known to the Federal counting power.

The acts involved, therefore, in the *quo warranto* proceedings were of the very highest public nature, and were yet potential. In such cases the law of Florida, and in America generally, in all cases of public servants, the elector being no exception, makes applicable the *quo warranto* even where the term of the office has expired. This is especially true where, as in the Florida Case, the application for the writ is made at the earliest possible opportunity, the action being necessary to determine the validity of the acts of which the relators complain.

The certainty of the grounds of the writ is heightened where the acts of which complaint is made are intended to confer rights upon others. The acts of the Republican claimants in attempting to cast the electoral vote of Florida were intended to confer upon Hayes the right to the Presidency of the United States. At the time of the court's judgment he had not been invested with that high right: the Tilden men in the

[18] Proceedings, 906.

quo warranto arrested it at its source; the court, at their instance, held up the cloak and exposed to view the fraud for the information of the Federal counting power. The mischief of which the Tilden men complained had not been consummated when the *quo warranto* judgment was handed from the bench; it was arrested in *transitu,* and the Federal counting power was shown that the Republicans had no right to cast for Hayes the electoral vote of Florida. That judgment destroyed no right in the Hayes pretenders; it was the search-light of the State locating her political act as defined by her laws provided before this bitter contest, by which laws alone it could be her act. This judicial illumination created no right in the Tilden claimants: it discovered to the Federal counting power an *existing right* and pledged the faith and power of the Commonwealth of Florida to enforce recognition of that right: it made plain that that right was the function of the Tilden men to cast for Florida her electoral vote.

Then, having jurisdiction over the remedy by *quo warranto,* having had jurisdiction and service upon the parties, it only remains to see the scope that the court might take in the case. The Republicans on the Commission held that the pro-Hayes report of the State canvassing board constituted the act of the State; and, therefore, that the State canvassing board was the final determinant of the question as to who had been elected at the election of November 7, 1876. This conclusion of the Commission was in violation of the jurisdiction in such cases accorded courts in *quo warranto* actions, since the very origin of the action. That courts may go behind the return of the canvassers and

investigate all the facts of the election, is the undoubted jurisdiction of the court. Basing a deduction of the rule upon a long line of well-recognized authorities, High says:

"It is now the well-established doctrine, that in proceeding upon information to test the title to a public office, the return or certificate of the canvassing officers as to the result of the election, is not conclusive as to the result or to the title to the office. Such officers are, in general, held to be only ministerial officers, vested with no judicial functions whatever, and their return is, at the most, but *prima facie* evidence in favor of the incumbent to the office. The courts will therefore go behind such return, and will investigate the facts of the election, the number of votes cast, and the legality of the action of the canvass. * * * But as between the actual ballots cast at the election, and the canvass of those ballots by the canvassing officers, the ballots constitute the primary and controlling evidence of the election. So the fact that the incumbent *de facto* of an office holds a commission, therefore, is not conclusive as to his right, since the title is derived from the election and not from the commission."[19] As shown more fully elsewhere herein, the rule as thus stated was the law of Florida at the time of this case. It was not only the well-recognized jurisdiction of the court as founded upon the common law rules, but it was a part of the fundamental law of the State. Section 16, article 16, of the Florida constitution provides: "A plurality of votes given by the people at an election shall constitute a choice." When the law of 1872

[19] Extra. Legal Rem., 2nd ed., secs. 638, 639a, 76; 19 Am. & Eng. Enc. Law, 673.

provided that electors of President and Vice-President of the United States should be *"elected,"* this provision of the constitution made the plurality of the actual legal ballots cast at the election the controlling evidence of the election.

Therefore, when the State court exercised jurisdiction to determine whether or not the pro-Hayes report of the State canvassing board was valid, it was fully within its jurisdiction and right *as defined by the State constitution and law.* The judgment of the court and not of the canvassing board was the credential upon which the Federal counting power should have relied in counting the electoral votes of Florida, unless there were some prohibition in or authorized by the Constitution of the United States rendering some element of the State law or procedure unavailable in the case of Presidential electors.

Then, second, in reference to Presidential electors, does the Federal Constitution forbid or authorize Congress to prohibit to a State the use of any one of these rules of *quo warranto?*

The only provisions of a Federal nature bearing upon this point are in the Constitution which says: "The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States;"[20] and in the law, pursuant to this provision, which indicates the time of the choice and names the day for the meeting of the electoral college.

Now, remembering that the fundamental principles of *quo warranto* are neither new nor peculiar to Florida, having been the law long before the Hayes-

[20] Art. II., sec. 1.

Tilden contest, and being well known at the formation of the Constitution, let us see if any fair interpretation will serve to render the State *functus officio* to determine which of claimant parties were the rightful electors, by proceeding after the day upon which the rival claimants had attempted to cast the electoral vote of the State.

Let us find whether or no electors are Federal or State officers, and what powers the Federal government may exercise over electors. Defining the powers of the Federal government over electors, Commissioner Garfield correctly said:

"To sum up these limitations in brief, in obedience to the Constitution, Congress fixes the day for choosing the electors, and the day when they must vote. It prescribes the number of electors for each State, and limits their qualifications. These are the only limitations upon the authority of the States in the appointment of electors of the President. Every other act and fact relating to their appointment is placed as absolutely and exclusively in the power of the States, as it is within their power to elect their governors or their justices of the peace. Across the line of these limitations Congress has no more right to interfere with the States than it has to interfere with the election of officers in England." [21]

"The appointment and mode of appointment belong exclusively to the State. Congress has nothing to do with it, and no control over it," said Judge Bradley concurring with Garfield.[22] The appointment of

[21] Proceedings, 965-6.

[22] Ib. 1020.

electors belongs by the Constitution wholly to the States, "who shall appoint in such manner as the legislatures thereof may direct," said Judge Miller.[32] Said Judge Strong: "The appointment of electors however it may be is peculiarly and exclusively a State affair. * * * She has entire control over the elections, over the returns, and over the canvass." [24]

Hence, it has long been settled that, "although the electors are appointed and act under and pursuant to the Constitution of the United States they are no more officers or agents of the United States than are members of the State legislature when acting as the electors of Federal Senators or the people of the States when acting as the electors of Representatives in Congress," as the Supreme Court of the United States said in the case of Green, where the question was directly in issue.[25]

Therefore, being so peculiarly a State office, the Federal government most certainly cannot protect it against usurpation. The framers of the Constitution and the States that ratified it well knew that the common law remedy by the writ in the nature of a *quo warranto* was *the remedy* by which the sovereign *protected* against "usurpation or intrusion into, or unlawfully holding and exercising," all offices or franchises created by the sovereign power and filled either by the king or by the people. They knew that since 1710 the statute of 9th Anne had given *private* persons the right to have and prosecute this writ in such man-

[23] Ib. 1009.

[24] Ib. 997.

[25] *In re* Green, 134 U. S., 377, 379-80.

ner as is usual in cases of information in the nature of a *quo warranto*.[26]

It was well-known that in such cases, prosecuted either by the sovereign or by private relators, the courts were authorized and empowered to give judgment of ouster and also to impose a fine upon the defendant; and that the relators might have in their favor judgment against the defendants for costs. Americans knew that Blackstone had said: "The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive, even against the crown;"[27] and that though not so conclusive in later English practice, it was the common law's great instrument for protecting against usurpation and intrusion all "offices and franchises by punishing the usurper or intruder," no less than to recover to the State a usurped office or franchise; and that it was both penal and civil in its nature.[28]

Punishment must *succeed* the wrong. The power to punish inherently carries the power to determine the rights of those over whom the jurisdiction extends. The Constitution gave the elector a function on a definite day, *one day;* the common law writ in the nature of a *quo warranto* gave the court having jurisdiction over the party exercising *that function* the power to protect it by punishing usurpers or intruders. The *jurisdiction* of the *quo warranto,* the *nature* of punishment; the *brevity* of the time for exercising the function of the office,—all render it impossible for a court to proceed to judgment upon a

[26] 9 Anne, ch. 20.

[27] 3 Cooley's Bla. 264.

[28] 4 Bla. 312.

writ of this nature *before* the *expiration* of the time for the act by the elector.

Then, the limitation of the Constitution as to the day upon which the elector must act, left the State not alone with "entire control over the elections, over the returns, and over the canvass," but with the power of protecting the office. Such a right is inherent in the very nature of government, as the Supreme Court of the United States in 1865, in *Territory* vs. *Lockwood*, said.[29] Such a right being inherent in government; and, unquestionably not in the United States government as to the office of Presidential electors,[30] must adhere in the *State government:* the elector is the officer of the State and his office is under the protection of the State. Since it is undisputed that an elector is exclusively a State officer or representative and his office or function peculiarly and exclusively under the protection of the State; and since it was well known that the *quo warranto* was only available where there had been user or attempt at user; and since user or attempt could occur only and solely on the day, the *one* day, certain and fixed by Congress; and since there was no other remedy of a like adequate nature known to the common law; and since the United States Constitution provided no Federal remedy for protecting the office of elector, it seems to me an irresistible conclusion that the Federal Constitution pre-

[29] Ter. *vs.* Lockwood, 3 Wall. 236, 240.

[30] In harmony with the general principles of interpretation, in the act of Congress of May 31, 1870, conferring upon Federal circuit courts jurisdiction of suits to recover offices, electors of President and Vice-President are excepted, thus again giving emphasis to the fact of State jurisdiction. 16 St. L. 146, 4 An. S. 235.

serves to each State the fullest power to determine subsequently to the electoral day which of disputants exercised on that day *her* office, which determination in the very nature of the case under the long settled common law *quo warranto* rules can only be *post hac*.

Why have I gone to the common law as understood in America at the adoption of the Constitution for the rules by which to construe that instrument? The lawyer need not be told; and all students now generally know that the words and terms of the Constitution are to be construed and enforced in the sense in which they were understood by those who proposed and those who adopted that instrument, or an amendment at the time of its incorporation.[31]

Following the early and uniform decisions, as the Supreme Court said in Bain's case in 1887, in construing the Constitution "we are to place ourselves as nearly as possible in the condition of the men who formed that instrument." [32] The condition of the parties who framed and adopted the Constitution may be most certainly known, and the instrument may be more clearly understood, it is now unquestionably settled, by the light of the common law. "The Constitution of the United States, like those of all the original States (and in fact of all the States now forming the Union, with the exception of Louisiana) presupposed the existence and authority of the common law," said the court in *Lynch* vs. *Clark* in 1844.[33] These rules are now uni-

[31] The Huntress (1840), 2 Ware, U. S., 89, 12 Fed. Cases, No. 6,914.

[32] *Ex parte* Bain, 121 U. S. 12; Brown *vs.* Maryland (1827), 12 Wheat. 137.

[33] 1 Sandf. Ch. (N. Y.) 652.

versally recognized.[34] "The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantage of the common law. The Constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof,"—as we find the law affirmed in *Murray* vs. *Chicago,* &c., in 1894.[35]

It is interesting that at the adoption of the Constitution Blackstone's Commentaries, which brought the law of England down to that day, and which is one of our greatest and most satisfactory expositions of the common law, were more generally known in America than in England; and "familiar not only to the profession, but to all men of the general education of the founders of our Constitution." [36]

The Federal law enacted February 3, 1887,[37] was meant to limit the time within which any State may determine any controversy or contest concerning the appointment of all or any of her electors. It provides that such determination shall be conclusive and shall govern in counting the electoral votes of that State, only when the determination shall have been made at least six days prior to the time fixed for the meet-

[34] Schick *vs.* U. S. (1904), 195 U. S. 68; U. S. *vs.* Wong Kim Ark (1898), 169 U. S. 654; Smith *vs.* Alabama (1888), 124 U. S., 478, and many others in an unbroken line; Ewing, Legal and Historical Status of the Dred Scott Decision, 12.

[35] 62 Fed. R. 27, 92 Fed. R. 868. See also Frank Hendrick, The Power to Regulate Corporations and Commerce. 256 et seqr.

[36] Knote's Case (1874), 10 Ct. Cl. 397, *affirmed* (1877) by Supreme Court U. S., 95 U. S. 149; Schick *vs.* U. S. (1904), 195 U. S. 68.

[37] 6 Anno. Statutes, 17, 24 Statutes at L. 373.

ing of the electors. This statute has, of course, no bearing upon the Florida contest, except in so far as it may be taken as an admission that before its enactment a State might provide such means as her laws recognize, finally and conclusively to determine such questions *after* the day upon which electors by the Federal law are required to meet. However, the student will be interested in the observation that the constitutionality of this law is questionable. In effect the law is utterly destructive of the proceeding in the nature of a *quo warranto*: and for the simple reason that this action cannot be invoked until there has been some user, or threat or attempt of user, by the party against whom the writ is aimed. Had this provision of 1887 been the law at the time of the pro-Hayes report by the State canvassing board of Florida, the courts, the final determinant provided by the law for reviewing such actions by the State board, would have remained powerless, since the State canvassing board did not conclude its labor until after one o'clock of the morning of the day upon which the electors by the Federal law were required to meet. This restrictive Federal measure, therefore, is inconsistent with the true American conception of State sovereignty; and of that part of such sovereignty preserved by the Federal Constitution necessary to protect the *State office* of Presidential elector. It is unwise and unfair because it restricts the State to limits too narrow as compared with the great interests to be served.

It is, for these reasons, confidently believed that the judgment of the Florida court rendered in the *quo warranto* proceeding was final as to the rights of the parties claiming to be electors; and that its conclusion

that the Hayes claimants were and at all times had been mere usurpers, whose acts were null and void, was binding upon the Commission; and that that judgment embodied an authoritative and conclusive construction of the Florida law, by which law the Commission claimed to be governed, and that that construction should have been respected.

VIII.

The Florida Election Law.

WE are now to examine the decision of the last question, as the majority shaped the situation, before the Commission in the Florida Case. Rejecting the acts of the State subsequent to the electoral day, the majority of the Commission assumed to determine for the State which acts of her election officers were according to her laws, and thus had become the act of the State. So, entirely aside from the question whether a State is *functus officio* as to her electors after the day upon which the Federal law requires electors to cast their votes, we come to the question whether the Republicans were right in the last analysis in deciding that the board of State canvassers "is made by the statute the ultimate declarant of what the vote was and of its results;" and that the board's *jurisdiction* over the returns "is not merely to count up and compare the returns, but upon all the facts submitted to them to determine, that is, to decide, who is elected."

Resting *alone* upon this majority *interpretation* of the State election law, the correctness of that interpretation is most vital to the Hayes title. Hence to find the true interpretation of the State law, and to measure the actions of the State board by that law, that we may see if the majority was right in holding that the law was such that the pro-Hayes report was the act of the State, we must see just what the State

board did. With the acts of the board and the law both before us, we may grasp firmly the points involved.

We remember that two claims were made by the State canvassing board. First, that *upon their face* the returns before the board showed a majority for the Hayes claimants. An examination of this claim is reserved for a subsequent chapter. Second, that after having been *canvassed,* the returns yet gave the State to Hayes, though by somewhat different figures. So the board did not merely add up the vote as shown by the returns before them, but they *canvassed* those returns; they took such action as brought before them evidence which they believed justified them in *altering the returns,* amending some by subtractions and changing others by additions; while still others were entirely rejected *in toto. Upon this canvass they rendered the pro-Hayes report;* and this is the report and canvass that the Republicans sustained, holding that under the law that determination and declaration of the board was *within its jurisdiction,* that *by the law* the board was the final, ultimate determinant and declarant of what the vote was and of its result; and that, therefore, the pro-Hayes report was the act of the State.

The record left us in the action of *Drew* vs. *the Board of Canvassers* by mandamus, tried in the supreme court of the State before the Commission met, furnishes one of the best sources from which to learn what was done by the pro-Hayes board in its canvass, while it affords also the best opportunity to study the statute. We thus get the interpretation of the local law as given by the highest court of the State; and this interpretation measured by prior local well-

settled law, and by the general rule in America, may then be properly valued, which necessarily places a correct estimate upon the construction by the Republicans of the Commission and, of course, upon their decision of the Florida case.

There was practically no difference between the votes cast for the presidential electors and for the State candidates. The same canvass which resulted in a pro-Hayes determination also resulted in a pro-Republican decision for the candidates for State offices. Thus the Republican governor, Stearns, was declared re-elected, and the election of a Republican legislature and other State officers appeared along with the pro-Hayes finding. *An interpretation of the acts which led to the Republican decision in the State election, is an interpretation of the acts which led to the pro-Hayes report.* The board had no more and no less jurisdiction in the one case than in the other, and as to each performed the same acts; and the facts in the one case, unchanged in any respect whatever, are the facts of the other.

In several aspects of this case it is important to know, as preliminary to the main study, that in such cases as the one instituted and prosecuted by Drew, the supreme court of Florida had undoubted jurisdiction to proceed in *mandamus* against the board of State canvassers. Jurisdiction is given in such cases by Art. VII., sec. 5, of the constitution of 1868,[1] then the fundamental law of the State. Long before the Hayes-Tilden contest, the supreme court held that the action of *mandamus* was the proper and only efficient remedy to enforce the performance of duties by ministerial

[1] Poore, Charters and Consts., 353.

officers or officers having whatever power the State board had;[2] and in *Bloxam* vs. *the Board of State Canvassers,* decided in 1871, the identical point raised in the Drew case was before the court on a writ of *mandamus* to compel the board to perform the same act and duty which Drew sought to enforce in 1876. The court sustained its jurisdiction and sanctioned the remedy.[3] It is claimed that the jurisdiction of the State board in 1871 was not the same as in 1876, as to which we shall see more fully presently; but let us remember that no one has ever questioned that the supreme court had the same jurisdiction by *mandamus* in 1876 than it had in 1871 and long before that time. The rule laid down by the court in 1868 was yet the rule in 1876: that "a proceeding in reference to the highest officers of the State, is almost universally instituted in the highest courts of the State or nation."[4]

In the petition filed December 13, 1876, Drew gave as the grounds upon which he asked the writ that the State board had usurped jurisdictional functions and powers in "that they went behind the face of the election returns from divers counties of the State, and did, upon certain affidavits, or pretended affidavits, and upon other pretended evidence discard the vote of the county of Manatee, and did refuse to canvass and count and enumerate the votes of the counties of Jackson and Hamilton, as shown by the returns of and from the said counties of said election * * * and that they should have confined their canvass of said returns to what was shown or appeared on the face of the said re-

[2] Commissioners *vs.* King, 13 Fla. 451.

[3] 13 Fla. 55.

[4] State *vs.* Gleason, 12 Fla. 190, 202, 212.

turns, the same not appearing to be unintelligible or fraudulent, but genuine and *bona fide*."[5]

The two Republican members of the board, McLin and Cowgill, filed an answer; while the Democratic member, Cocke, filed a separate answer. The Republicans denied any usurpation, and alleged that as to Manatee "it appeared from the return of said county and from evidence received by said board, that the return was so irregular and false and fraudulent that said board was unable to determine the true vote, and so did not include it in the count upon which they based their determination and declaration." As to the counties of Jackson, Hamilton, and Monroe, they said "it was shown by evidence that the returns therefrom were severally false and fraudulent, and that the board determined from the evidence, with reference to each of said counties, what the true vote therein was * * * and the result of such determination was acted upon in declaring the result."

On motion the court required this "answer to be amended so as to set forth the specific causes and grounds of such rejection in each and every instance of such rejection." On December 18 the defendants complied with the order of the court.

In the amended answer the majority of the board, the two Republicans, said that they did not include in their count the returns from the county of Manatee "upon the ground of irregularity and fraud in the conduct of the election on said 7th day of November, 1876." The irregularity, they charged, consisted in receiving the votes of persons not registered, and

[5] 16 Fla. 19, 22, 30.

that this was shown by evidence entirely apart from the returns before them.

They include the county of Clay in the amended answer, and say they added 29 votes to those cast for Drew and 6 to those cast for Stearns upon the ground that said votes had been improperly rejected by the *county* canvassers. They deducted four Drew votes and two Stearns votes "upon the ground that said votes were cast by non-residents of the county."

As to Hamilton county they said they deducted the vote of precinct number two from the returns from said county "upon the ground of gross violation of the election law, and fraud in the conduct of the election," "as appeared from the returns."

Five votes cast in Hernando county were rejected; two from the vote cast in Leon county; seven from the Orange county vote, on the ground that "said votes were illegal or illegally cast." 557 votes were deducted from the returns before the board, from the vote of Jackson "upon the ground of irregularity and gross fraud in the conduct of the election." 61 votes were deducted from the votes "as they appeared from the returns" of Jefferson upon the ground that they were "fraudulently cast." The vote of one precinct in Monroe was deducted from the county "vote as it appeared on the face of the returns" on the "ground of irregularity in the conduct of the election and fraud in the conduct of the inspectors of said election in said precinct." [6]

Five votes were deducted from the returns from Hernando county on the ground that said votes were *illegally cast.* From the vote of Leon two deductions

[6] Ib. 30, 31.

were made "on the ground that they were illegal." From the Orange county returns seven were taken on the ground that they were illegally cast.

Now, with these *admitted* acts of *canvass* by the Republican members of the State board, with which the Democratic member did not concur, in mind, let us get down to strictly judicial consideration of this canvass to find whether such acts were within the jurisdiction of the board. Governor Drew and the Democrats insisted that these acts by the majority of the board were *ultra vires*; and if so, then even the Republicans admitted them to be invalid. The Democrats also contended that since the board had not complied with the law, it might be required to reconvene and recanvass within its jurisdiction. So the investigation upon this point will determine, first, the jurisdiction of the board; and second, whether, having adjourned before judgment in a *mandamus* proceeding, it may be required to reconvene and recanvass according to the law under which it acts as that law is *construed by the court.*

Bear in mind that the county canvassing board, composed of the county judge, the clerk of the circuit court, and a justice of the peace, was required to canvass the votes "as shown by the returns on file in the office of the clerk or judge." These were the returns received from the officers at the precincts where the votes themselves are cast by the voters. The county board was required to make and sign duplicate certificates, to be recorded by the clerk, one of which was to be sent to the governor and the other to the secretary of State. These returns from the various counties thus filed in the office of the secretary of State

were the returns that were canvassed by the State board. The duties of the precinct officers and of the county canvassing board, in the election of 1876, are defined by the acts of 1868.[7] The act of February 27, 1872, was merely amendatory of the law of 1868, and leaves unchanged the provisions governing precinct officers and county canvassers. The most important change in the law is that found in section four of the amendment, defining the jurisdiction of the board of State canvassers. Upon its interpretation depends the justification or excuse for the decision of the Commission, granting the Commission the right of interpretation its majority assumed.

This amendatory section creates a board of State canvassers similar to the board as it existed under the law of 1868, directs the time and place of meeting; and gives jurisdiction "to proceed to canvass the returns of said election" "received from the several counties" and "to determine and declare who shall have been elected" "*as shown by such returns.*"

Now, was the State board limited to an inspection of the face of these returns that were on file in the office of the secretary of State; or, had they jurisdiction to reject and refuse to count any numbers certified therein because they believed there was an illegal and fraudulent vote as the basis of the certified results?

Our labor is much simplified by keeping before the mind the admissions made by the Republicans in their answers to the *mandamus* petition. They make no charge whatever that any grounds upon which they refused to ratify or accept the certified count of the

[7] Laws of 1868, 67.

various Tilden votes appeared upon the returns before them made by the county canvassers. They charge no fraud against the county canvassing officers; and not once is it claimed or alleged that any such return was irregular, ambiguous, or shown to be a false or fraudulent canvass of the returns received by the clerk and the judge from the precinct officers of the respective counties. Not only are these confessions made in the answers to the *mandamus* but the minutes of the State canvassing board show that no ground upon which the pro-Hayes majority of the State board rejected enough Tilden returns to report the final result in favor of the Hayes electors, appeared upon the face of the returns made by the county canvassers or in connection with their canvass. When the returns from the counties, Democratic votes from which were rejected by the State board, were compared with the returns on file in the respective offices of the clerks, they were found to correspond exactly with the polls and with the returns by the precinct officers. Every single charge went to matters that did not arise upon the face of the returns that were before the State board, and no evidence impeached or questioned them as true and honest returns of the votes given.

Hence, but the one question is involved: Had the State board jurisdiction to reject returns because they believed there was an illegal and fraudulent vote behind them; or because they believed the election itself had not been legally held or conducted? In other words, had the State board jurisdiction over the whole subject?

The Republicans based their affirmative answer to these questions upon two grounds. Judge Miller and others

contended that the words of the statute authorizing the board "to determine and declare" gave jurisdiction "over the whole subject."[8] Our first concern, then, is to find the proper construction of these words.

The law of 1868 under which the State board acted, provides that this board "shall proceed to canvass the returns of such election, and determine who shall have been elected, by the highest number of votes, to any office, as shown by said returns. They shall make and sign a certificate declaring the result," which shall be sent to and recorded in the office of the secretary of State.[9] This is in legal effect the language of the amendment of 1872. In both acts jurisdiction is given the State board to *determine* and to *declare* the result as shown by the returns, and to certify who shall have been elected.

In 1871 the supreme court of the State handed down a decision in the case of *The State* vs. *the Board of State Canvassers,* defining the jurisdiction and power of the State board under the law of 1868. In that case it was shown that the State board, just as did the board in reaching a pro-Hayes report, had not included in the enumeration upon which they based their certificate or declaration of the result all the returns as shown by the certificates from the county canvassers. As did the pro-Hayes board in the Florida case, so in that case the board had adjourned *sine die.* The court had directly before it the two questions, the most important of which was: Has the board, in "determining who shall have been elected, power to reject or neglect any county returns" because they believe the re-

[8] Proceedings, 1010, 1011.

[9] Bush, Dig. Fla. Laws, 1868, 305; Laws of 1868, p. 8.

jected returns represented votes that had been fraudulently given, or that there was fraud on the part of the precinct officers in conducting the election? Along with an answer to this question the court also decided the other, which was likewise directly in issue: Having adjourned, after having exercised jurisdiction to reject returns by reason of something connected with the votes or the conduct of the election, can the board be compelled by *mandamus* to reconvene and recanvass, and required to include all the returns as certified by the county canvassers?

Deciding these questions the court said: "The object of the law is to ascertain the whole number of votes cast, and who had received the highest number of such votes, so that the choice of the majority of the votes might be ascertained and reflected." Then the court held that the State board had no jurisdiction to reject any returns as shown by the certificates of the *county canvassers*, and that, having neglected or refused to include in its final determination and declaration any such returns, they had "neglected to perform their duty, and therefore did not comply with the law, in which case they did not conclude their duties as canvassers, nor put an end to their powers as canvassers by an adjournment *sine die*. Their duties and functions are mainly ministerial," the court forcefully proceeds to hold, "but are quasi judicial in so far as it is their duty to determine whether the papers received by them purporting to be returns were in fact such, were genuine, intelligible, and substantially authenticated as required by law; in other words, *whether* they contained within themselves evidence that they were authentic returns of the election. If, as

is alleged, the respondent [the State board] neglected to examine and include returns, duly and legally made from several of the counties, and therefore but partially performed what they were by law required to do, it must be considered that they have not complied with the law, and that they may be required to do so by means" of a mandamus.[10]

Therefore, long before the Hayes-Tilden contest, it had been settled in Florida by the highest court of the State and was a recognized law that power "to determine and declare" did not vest jurisdiction "over the whole subject." Power to determine and declare limited the State board to an inspection and canvass of the returns before them, the returns made by the county boards and on file in the office of the secretary of State. When such returns were genuine, that is made by the officers of the county authorized by law to make them, intelligible and substantially authenticated as required by law, the State board had no jurisdiction to reject or refuse to enumerate any of them, no matter what the board may have believed with reference to the conduct of the election and the basis upon which the county returns were predicated. Where there is no ground for rejection other than that which is alleged to have occurred at the polls or on the part of precinct officers, the county returns must all be enumerated and be the sole basis for the declaration of the board. Having rejected certain returns because of what the board believed to have occurred at the polls, the pro-Hayes report of the State board finds no justification in the mere fact that that board was directed to determine and to declare. Unless there

[10] 13 Fla. 55, 73.

can be found something broader in the law of 1872 it is clear that the board in rejecting enough of the Democratic returns from certain counties of the State to reach a pro-Hayes declaration, "had not complied with the law."

Was there anything in the law of 1872 giving the State board broader power or jurisdiction than it had under the law of 1868? The Republicans contended, in effect, that there was; and Haworth seems to retain this position.[11] Let us see.

This law enacted February 27, 1872, governing the State board, is as follows:

"On the thirty-fifth day after the holding of any general or special election for any State officer, member of the legislature, or representative in Congress, or sooner if the returns shall have been received from the several counties wherein elections shall have been held, the secretary of State, attorney-general and comptroller of public accounts, or any two of them, together with any other member of the cabinet who may be designated by them, shall meet at the office of the secretary of State, pursuant to notice to be given by the secretary of State, and form a board of State canvassers, and proceed to canvass the returns of said election and determine and declare who shall have been elected to any such office or as such member, as shown by such returns."

Up to this point in the statute no fair minded person will contend that the State board had any broader powers or wider jurisdiction than given by the law of 1868. The rule laid down by the supreme court of the State in 1871, is undoubtedly the rule by which

[11] The Hayes-Tilden Disputed El., 66.

the canvassing board was to determine its jurisdiction as given under this wording of this statute. The statute plainly limits the board to the returns sent to the secretary of State by the canvassing boards of the several counties. The State board was to determine and declare the result "as shown by such returns." The supreme court of the State having determined that power "to determine and declare" did not carry "jurisdiction over the whole subject," this amendment leaves the board thus far with precisely the same jurisdiction which it enjoyed under the law of 1868. Thus far this amendment charges the State board with the simple ministerial duty of enumerating the votes given for each candidate as shown by the returns "received from the several counties wherein elections shall have been held."

Most of the Republicans relied strongly upon the remaining paragraph of this law as amended in 1872, which immediately says:

"If any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such returns in their determination and declaration; and the secretary of State shall preserve and file in his office such returns, together with such other documents and papers as may have been received by him or by said board of canvassers. The said board shall make and sign a certificate containing, in words written in full length, the whole number of votes given for each office, the number of votes given for each person for each office and for member of the legislature, and therein declare the result, which cer-

tificate shall be recorded in the office of the secretary of State." [12]

Whatever this additional wording may mean, there was no ground in the case before the board for the exercise of any broader jurisdiction than that conferred by that part of the law first above given. "If any such return shall be shown or shall appear to be so irregular, false or fraudulent," indisputably refers to the returns received by the secretary of State from the canvassing boards of the several counties. These were the only returns before the State board, the only returns they were authorized to canvass, and the only returns they claimed to have jurisdiction to canvass. The State board, as is conclusively established by the Republican answers to the petition for the *mandamus,* made no claim that these returns before them and which they proceeded to canvass were or were shown to be "irregular, false or fraudulent." The canvass upon which Hayes was declared elected admitted that the changes which the State board made and which gave the majority to the Hayes claimants, were based upon matters entirely extrinsic to the returns before the board from the county canvassers. Admitting the legality of what is known as the Coxe returns from Baker county, the certified results from the county canvassing boards corresponded exactly with the polls and with the returns from the precincts and on file in the clerks' offices of the respective counties. It was not the county returns that the pro-Hayes report impeached, but the election which lay behind those returns and which formed their basis. The pro-Hayes canvass did not attempt to justify the changes that it

[12] Proceedings, 976; McClellan's Fla. Dig. 498.

made in favor of Hayes on the grounds that any *returns* were or were shown to be irregular, false or fraudulent.

The lawyer need not be told that falsehood, fraud or irregularity in an *election,* occurring *at the polling places* or committed by those who conduct the election, constitutes no fraud in the county board who aggregate the results of the precinct returns, and certify the total vote of the county to the secretary of State.

Now, as we have seen, under the statute of 1868 the State board unquestionably had no jurisdiction over the *manner* in which the *voting* was conducted. No one would contend that under that statute the board's jurisdiction extended over the whole subject; under that statute they had no jurisdiction, except to see that the returns before them were intelligible, properly authenticated, and without fraud on the part of the *county* canvassing officers—not the precinct or election officers. These requirements being met, the State board, beyond a peradventure, had no discretion: it must do no more than add the votes shown by such returns and declare the election of him having a plurality. Any other than a mere enumeration in such cases rendered a result resting thereon and reached thereby *ultra vires, ipso facto,* null, void, and, of course, giving no insignia of right.

Looking at the statute as amended in 1872, no word, phrase, or sentence can be found that even suggests that the jurisdiction of the State board is *changed as to that over which* it is to be exercised.

Clearly, the statute limits the board to definite action, the same action that it might take under the old law, except that the amendment defines what the board must

do should it, on account of irregularity, want of intelligibility, falsehood, or fraud in connection with the county returns be unable to determine the true vote given at the election as certified by the election officers. No grounds for the exercise of the jurisdiction conferred by the amendment arising upon the face of the returns, or being attributed or shown with reference thereto, the board must count the whole number of the votes as given upon the face of the papers before them, and declare the result in a certificate containing the whole number of votes thus shown to have been given for each office, and the number of votes thus shown to have been given for each person for each office. Neglecting or refusing thus to include in their declaration of the result all the votes as certified upon the face of such returns, failing "to give a certificate of the result of the election, as appeared by the returns in their possession at the time they made their final statement," to use the words of the supreme court in deciding the case against Gibbs,[13] in 1871, they "therefore do not perform what they by law are required to do, and it must be considered that they have not complied with the law." Therefore the pro-Hayes report, being the result of acts *ultra vires*, was not the act of the State, and furnished no "insignia of title."

Hence, when the supreme court of the State in its judgment in the *mandamus* prosecuted by Governor Drew against the State board of canvassers decided that the board should have included and should have counted in its report of the result, *all* the county returns that it rejected, the decision was in harmony with

[13] 13 Fla. 55, 74.

the long settled law of the State. This interpretation rather than that of the majority of the Commission, was correct.

Not only was that decision in the *mandamus* in harmony with the settled law of Florida and a correct view of its statute, but it was an expression of the law defining the jurisdiction of State canvassers, as almost universally enforced in America. Says a recognized authority: "The State canvassers can act only upon the certified statements of the county canvassers returned by the several county clerks to the secretary of State, and have no authority to procure corrected returns or to go behind the returns thus made, or to receive testimony *aliunde* either to sustain or to invalidate them." [14] As did the State board to reach the pro-Hayes result, "they have no right to reject any returns because they beleive there was an illegal or fraudulent vote behind them." [15]

The reasons for this rule are patent. Canvassing boards are not courts; they have no means of investigating all the facts incident to a charge of illegality pertaining to the votes, or fraud or dishonesty in the conduct of the election. Such questions are left to courts in *quo warranto*, *mandamus*, or proceedings by contest. The reason for the enforcement of the rule in the case of the Florida State board was pre-eminent. A decision of such questions can be reached only after the full evidence of the facts has been adduced. There can be no evidence without witnesses or their duly

[14] 15 Cyc. 385, citing numerous authorities; 10 Am. Eng. Enc. Law, 2nd ed., 746, giving a yet larger list of authorities formulating this long settled doctrine; 14 Am. Eng. Enc. Law, 198, note.

[15] 6 Am. Eng. Enc. Law, 311, and note 2 wherein are gathered all the leading cases upon this point.

taken depositions. The Florida State board had no power to command either. From the very first all of its members conceded this fact, and to escape it the Republican members agreed that they would receive as evidence *ex parte* affidavits. Yet, admitting it had not adequate power to do what it assumed to do, the board plunged into a fierce investigation of the election and the conduct of the precinct officers. The result was the most farcical and disgraceful canvass ever left upon record by a State board. It is not strange that, the excitement incident to the struggle having subsided, McLin, the secretary of State, should have said under oath: "If the board had acted in accordance with the decision of the supreme court of the State, defining the powers and duties of the board in reference to throwing out precincts, since rendered, there is no question of the fact that Mr. Tilden would have been entitled to the vote of Florida."[16] And since the opinion of which he here speaks, was a mere restatement of the law as theretofore understood and enforced in Florida with reference to throwing out precincts, if the board had acted in accordance with the settled law of the State there is no question of the fact that Tilden would have been declared to have received the electoral vote of Florida.

Following the older decisions, the supreme court in its judgment upon the facts brought before it in the *mandamus* prosecuted by Governor Drew, ordered a recanvass in accordance with the law as expounded by the court. This judgment was reached in January, 1877, and resulted, because it recognized the *bona fide vote,* in establishing the election of the Democrats; but, as to

[16] Ho. Miscl. Doc., No. 31, pt. 2, 98: 45 Cong., 3 sess.

the Presidential electors, it is of most importance for the facts showing the actual jurisdiction exercised by the board and the power which that body assumed in reaching the pro-Hayes report. The court held that the Florida election law did not give the State board authority to determine whether an election was legally held or the vote legally cast; and pointed out that the phrase "the true vote given" meant the vote actually cast, as distinguished from the legal vote.

The interpretation given to the State law by the State court both prior and subsequent to the action of the board in this case, was in common with that of the other States, was in harmony with the American law upon this subject, therefore; while that of the Commission was strained and unnatural, entirely at variance with the spirit of the election laws of this country. Yet were it a mere question as between the two interpretations, the situation would be less serious. There is another principle, to ignore which is to subvert a most vital factor in the government as understood and enforced in America, by which the decision of the Commission must also be measured. As early as 1847 the Supreme Court of the United States laid down this axiom of our government thus: "The Supreme Court of the United States will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws." [17] On January

[17] Rowan *vs.* Runnels, 5 How. 139; Webster *vs.* Cooper, 14 Howard, 488; Darlington *vs.* Jackson county, 101 U. S. 688, note; Marshall *vs.* Ladd, 131 U. S. LXXXIX. Appx.; Enfield *vs.* Jordan, 119 U. S. 680; McElvaine *vs.* Brush, 142 U. S. 155, are a few of the leading cases announcing this unquestioned rule.

18, 1909, Mr. Justice Day, delivering the unanimous opinion of the Supreme Court of the United States in *Palmer* vs. *Texas,* the well known Waters-Pierce Oil Company case, where the construction of a local law by the State court was directly involved, said: "The Texas courts have a right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal courts." 212 U. S. 118, 131. The leading and earlier decisions to the same effect have been cited not only often since by the Supreme Court of the United States, but hundreds and hundreds of times by State and inferior courts all over this country. This rule obtains in all the relations involving the powers of the State and Federal governments. There is but one exception, and that is in respect to commercial law and general jurisprudence.[18] The exception most certainly has no place in determining the powers of the State canvassers, all parties agreed. The rule is so well recognized and so wise in its operation that the decision of the State court construing statutes of the State is followed even where in a subsequent case the same court uttered doubt as to the correctness of the construction.[19] Not only had there been no doubt expressed by the highest court of Florida as to its construction of the statute governing the election canvassers, but the construction given at an earlier day had been confirmed in the same case being heard by the Commission. And so vital to the American government, a government in which each State is as real and sovereign in its sphere

[18] Presidio county, Texas. *vs.* The Noel-Young, &c. (1909), 212 U. S. 58, 73, and authorities.

[19] Waggoner *vs.* Flack (1903), 188 U. S. 600, and authorities.

as the United States is in its,[20] that in questions of State law within the sphere of the State, the Federal government accepts the construction given by the highest court of a State to a statute in determining whether the statute violates the Federal Constitution.[21]

Let no one make the mistake of thinking that the rules and principles recognizing the conclusiveness of constructions of local statutes by State courts, are applicable only to litigation coming before the Supreme Court of the United States. The constructions by the State court were *no less binding upon the Commission,* because "the construction given to the statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding as is the text."[22] This is true because it is the *construction* that makes a law, a constitution, or any instrument, what it is; in other words, a law is only what that power enforcing it construes it to be. Construction by the Commission, a body representing, and having no power or authority not possessed by, "the two Houses acting separately or together," divested the State of that exclusive and absolutely independent control over the manner of choosing her electors that was and is one of the chief characteristics of the *dual* American government.

[20] Ewing, Legal and Historical Status of the Dred Scott Decision, 9 et seqr.

[21] Tullis *vs.* Lake Erie & W. R. Co., 175 U. S. 348, 353; Cargill *vs.* Minn., 180 U. S. 452.

[22] Leffingwell *vs.* Warren, 2 Block, 599; Douglas *vs.* Pike county, 101 U. S. 677; Ill. C. R. Co. *vs.* Ill., 163 U. S. 142; Taylor *vs.* Ypsilanti, 105 U. S. 60, widely cited with approval and as authority; are but a few of the many decisions resting upon this rule.

IX.

The Returns and the Canvass.

NOVEMBER 27, 1876, broke in splendid quiet over the little capital at Tallahassee. But its citizens and numerous guests were restless and anxious. A notable crowd gathered about the little chamber in which the State canvassing board was about to begin opening and counting the returns. Here and there the blue uniform of a Federal soldier reminded the Democrats that President Grant had the army marshalled at strategic points throughout the South. By order of Governor Stearns part of these Federal troops were placed about the State house while the canvassing board was in session.[1] It was not the first time Grant had thrust the bayonet into the civil affairs of the Southern States; and few Southerners, at least, had any doubt as to which side the army would take should the Republicans decide that their cause needed the roar of cannon to insure success. That the Republicans meant to inaugurate Hayes, right or wrong, else precipitate a *real civil war!* there can be no reasonable doubt. The Republicans of the canvassing board, McLin afterwards testified, had been assured of the "forthcoming of money and troops if necessary in securing the victory for Mr. Hayes."[2]

Civil victory is cheaper than the trophies of war; and therefore Republican leaders had determined upon

[1] Ho. Miscl. Doc. No. 31, pt. 2, p. 147: 45 Cong., 3rd sess.
[2] Ib. 98.

the most terrific civil battle in American history. Not content to leave Florida to determine quietly and in her own way the result of the election; unwilling to trust the two Republicans of the three members of the canvassing board, at President Grant's suggestion prominent men, some holding important Federal offices, from every quarter were sent to lend moral support; and astute lawyers, skilled in the subleties of legal technicalities, went to seize upon every available point of the law. So the little room in which the board first began its work was not ample: many visitors and residents were unable to find space inside, and a considerable crowd gathered in the corridors and about the building to await results. General Lew Wallace and Governer Noyes of Ohio were present and acting as leaders for the Republicans. It was made known that Noyes particularly represented Hayes and "spoke with the authority of a warm personal friend commissioned with power to act in his behalf." They were supported by General F. C. Barlow and William E. Chandler from New York, Attorney-General Little of Ohio, J. P. C. Emmons, H. Bisbee, Jr., Ampt, correspondent for the *Cincinnati Commercial;* D. W. Sellers, a leading lawyer of Philadelphia, and others took an active part on behalf of the Republicans. The Democrats, equally ardent and bravely undaunted, were forced to follow the Republican initiative, and in their voluntary presence the Democrats found able advocates and splendid legal ability in such men as G. W. Biddle of Philadelphia, Governor Joseph E. Brown of Georgia, the Brilliant Manton Marble, editor of the *New York World;* George P. Raney, Levitt Saltonstall, Malcolm Hay, P. Pasco, Robert L. Campbell, and

others—in all of both sides about thirty active lawyers and participants![3] Eagle-eyed and vigorously alert, these men of ability, many enjoying national reputations, scrutinized every act and word of Attorney-General Cocke, Secretary of State Samuel McLin, and Comptroller Cowgill, the State board of canvassers, as they opened, read, and then for days proceeded to canvass the returns sent in from the county boards and on file in the office of the secretary of State. A remarkable assembly which left for us a most wonderfully interesting record of its proceedings!

Writing of that memorable canvass shortly thereafter, General Lew Wallace, who took part therein for the Republicans at the request of Hayes,[4] said: "I doubt if in any State or county such a trial was ever witnessed; and yet throughout there was not a discourteous word; while the deportment of the board was the theme of common remark and compliment."[5]

What did this important body, more excited than honored, as the sequel proved, by the presence of such a bar, find in the several sealed returns as they were opened?

Having organized, the board adopted rules, one of which is as follows:

"The Secretary of State shall open the returns from each county, whereupon the board will proceed to examine the same, and determine from the face thereof subject to final review, whether the legal formalities and requirements with respect thereto have been com-

[3] Sen. Rep. No. 611, Arguments, pp. 18, 104, 462, 463, 466: 44 Cong., 2nd sess.

[4] Ho. Miscl. No. 31, 138; 45 Cong., 3rd sess.

[5] Autobiography, 905.

plied with; and upon an affirmative determination of such matters, the chairman shall announce the vote of the county."[6]

This rule embodied the contentions of the Democrats as to the jurisdiction of the board. Had it been followed, the result reached would have reflected the will of the State. But to have followed it would have given the State to Tilden; and therefore the Hayes influence brought such weight to bear upon the board as induced it to believe that it had jurisdiction to hear and determine a contest concerning the returns or any part thereof from any county. This position of the board led to the adoption of another rule authorizing contests for any cause or upon any ground, however regular, however in conformity with the legal formalities and requirements, the questioned returns upon their face appeared to be. Contestants were permitted to submit evidence tending to impeach any return upon ground entirely beyond the question as to whether the county boards had properly and correctly returned the votes as reported from the precincts; and thus was opened up an inquiry which led to an investigation of the conduct of the election itself at the precincts. Biddle of Philadelphia led the Democratic fight against this assumption of power by the board;[7] and the Democrats generally pointed out that, aside from an interpretation of the statute under which the board was acting, a contest of such a broad and far reaching nature was *ultra vires* as shown, among other things, by the fact that the board had no power to compel witnesses to attend or to testify. Power to hear such contests

[6] Sen. Rep. 611, 3: 44 Cong., 2nd sess.

[7] Ho. Miscl. No. 31, pt. 2, 137: 45 Cong., 3rd sess.

belongs to the jurisdiction of the regularly established courts in which rests the power to compel the attendance of witnesses and to enforce the proper testimony. Admitting its limitations, yet undaunted, the board promulgated another rule which provides that, "in view of the fact that the board has no power to compel the attendance or examination of witnesses, it will receive in evidence any proper affidavits" bearing upon any questions concerning either the returns or the election.[8] This rule, an admission that the board was about to go beyond its legal jurisdiction, opened the way for a batch of rottenness most disgraceful.

From the early part of the board's session up to the evening of December 4, they received evidence and counter-evidence, mostly *ex parte* affidavits, and heard written arguments by the lawyers. Every function of a court was assumed in covering this sweeping field. Cowgill, the Republican comptroller, was correct when later before an investigating committee of Congress he on oath said: "We exercised judicial functions."[9]

McLin, Republican secretary of State, affirmed that the returns had been kept by him under lock and key just as he had received them from the several county returning boards, and that no one except himself had had access to his files.[10] Beginning with the counties in alphabetical order, he opened and read the papers from each county. From the minutes of the board's meeting which were made by a stenographer, and which are given in full in Senate Report number

[8] Sen. Rep. 611, 4: 44 Cong. 2nd sess.

[9] Ib. 5.

[10] Ib. 428.

six hundred and eleven, forty-fourth Congress, second session, we learn what occurred as the work progressed.

The first return read that was questioned was from Baker county. McLin opened a paper and read therefrom one hundred and thirty Hayes and eighty-nine Tilden votes. The Democrats at once challenged this report. Said the speaker: "We give notice that we shall contest that return as fraudulent." "We have a certified copy of returns from Baker county which are entirely and absolutely different."[11] The reading then proceeded quietly until Clay county was reached. With the returns the county board reported from precinct number 8, number 11 poll, "that there was no evidence of the inspectors of the election being sworn, or that the clerk was sworn;" and that the vote from said precinct was 29 for Tilden and 6 for Hayes, "which we did not count in our return."[12]

The report from Duval county was signed by the clerk and a justice, it appearing upon the face of the paper that the judge, the third member of the county board, had refused to sign that report of the canvassers. The Democrats contested on the ground that this upon its face was not lawful or proper returns. Then McLin announced the votes as therein certified as 2,367 for Hayes and 1,437 for Tilden. The reading and the announcement of the votes then went on without incident, now and then one side or the other, without apparent cause and without suggesting any ground, simply announced a contest of the vote as reported, until Manatee county was reached. At once Martin,

[11] Ib. 417.

[12] Ib. 418.

for the Republicans—it was well-known that the county was largely Democratic—arose and announced:

"We contest the whole return from Manatee because we understand there was no clerk of the county, no sufficient notice of the election, no registration lists for the voters to vote on, and there were other irregularities; * * *"

To this McLin replied: "As there is nothing appears on the face of the return indicating what has been alleged, we deem it proper to read it, under the rule established;" and, there being no further objection, announced 26 Hayes and 262 Tilden votes.[13]

Before announcing the votes of Orange county McLin said: "I will mention the fact that the return from Orange county does not state from what county it comes. It is signed by 'William Mills, county judge, Orange county,' and that is the only place that indicates that the return comes from Orange county." No one objected or challenged the return, and its vote was announced.[14]

Without further incident the returns from the various counties were concluded. As thus read, "by what appeared upon their face," as General Barlow and others, notably General Wallace,[15] have testified, the added figures gave

Hayes	24,327
Tilden	24,287[16]

The Republicans lost not a moment in establishing

[13] Ib. 420.

[14] Ib. 421.

[15] Autobiography, 904.

[16] Sen. Rep. 611, pt. 4, 13: 44 Cong., 2nd sess.

the first impression upon the public mind: without waiting to see the outcome of the charge that the return as read from Baker county was fraudulent, the Republicans wired their newspapers and party leaders that "upon the face of the returns Hayes has a majority of the electoral votes of Florida." Before night this impression had been implanted upon the mind of every person who read the evening papers; and on down through the years the false cry has been caught up by writers.

The snake lay coiled in the returns from Baker county as read by McLin. Hissing it raised its yellow head menacingly when the Democrats assaulted its hiding place. The battle which followed the assault as we find it pictured in the original record left in the minutes of the board, of no little historical value, is well worth following.

Having read the returns as produced by McLin, the board took a recess; and on re-convening Pasco, for the Democrats, said:

"If the board please, before we enter upon any proceedings this afternoon we desire to have the returns from Baker county re-read and a mistake noted, and to ask if there are any other returns from Baker county in the office of the secretary of State."

To this Martin replied: "The only return received has been read, I presume." But McLin at once said: "There are other papers from Baker county." Chandler saw the danger and interposed: "I suppose there are many papers, are there not, of various kinds, affidavits and others, returned to the secretary's office?" McLin answered: "Oh, yes; there are quite a number of affidavits, and other evidence, and papers of different

characters produced." Again Chandler tried to escape what he foresaw, but Pasco pressed the question:

"Now, has there been any other paper purporting to be a return from Baker county received? If so, it will be in accordance with the proceedings of the board under the rule to have it read. I understand, from the proceedings this morning, that all returns should first be read over. I ask if they are all read over?"

Again McLin dodged: "We have read all the returns except from one county—Dade." (The Dade county returns were received later in the session.) But Pasco would not down; again he put the pointed question: "Is there another return from Baker county?" This time McLin replied: "As I understood, the board decided that this paper was not a true return."

Which paper? When had the board so decided? No other paper from Baker county than the one McLin first read had been before the board, and most surely no decision of the board had been made at that time upon the nature of any paper purporting to be a return, and this McLin himself was shortly forced to admit when he said, "The board has taken no final action as to anything."

Yet the Republicans hesitated and Pasco prodded them with their own rule, reading the clause which requires "the secretary of State shall open the returns from each county," upon which he observed: "Now, I understand that there is another return here from Baker county, which has not yet been submitted to the board, and that this rule is violated. The point I make is that this return should be opened and submitted and that we should have an opportunity to see what it is before we proceed. Now, if we are rightly in-

formed, there is another return which has not been opened, and the board has not proposed to examine the same, and determine from the face thereof whether the legal formalities have been complied with. That is the rule adopted, and it relates to this particular instance, if my information is correct. My proposition is simply that this rule be carried out, and that we may have all these papers purporting to be returned here before us before we go on."

Again Chandler and Martin attempted to avert the blow, but General Cocke interposed, and before he had concluded McLin surrendered, admitting that there were "two other papers purporting to be returns from Baker county." He then read one of these dated November 10, 1876, and signed M. I. Coxe, clerk of the circuit court of Baker county, and John Dorman, justice of the peace, which gave the electoral vote as 238 for the Tilden electors and 143 for the Hayes electors. He then read the other paper which was dated November 13, 1876, signed by the same parties, and recertifying to the same vote.[17]

How farreaching the difference between the first return as read by McLin, known as the Driggers return, and the others—more properly other, as the latter are duplicates except as to dates—known as the Coxe returns! Which was the *more regular on its face?* On what ground did McLin read the Driggers return rather than the Coxe certificate until forced to do so by the Democrats? The use of the Coxe return gave the State unquestionably to Tilden *upon the face of the returns,* as was conceded by General Wallace under oath before the investigating committee which later

[17] Ib. 423, 424.

made an inquiry at the instance of Congress.[18] The truth of this fact cannot be successfully questioned. Hence, so far as the *face* of the returns is concerned, as to who was shown to be elected thereby, depends entirely upon *which* return from Baker county is accepted.

It is certain that McLin knew the contents of both the Driggers and the Coxe papers[19], for we may treat them as but two returns, although there were, as we have seen, two of the Coxe certificates, alike in all respects except their dates. All of these documents were on file in the office of the secretary of State, and all were present when he selected and read the Driggers return in preference to that by Coxe. The Coxe returns were entirely regular upon their face; and the only point that the Republicans made against them was that but two officers had signed: M. I. Coxe, clerk of the circuit court of Baker county; and John Dorman, a justice of the peace of that county.[20] The same was true of the returns from Duval, showing a county majority for the Republicans. The Driggers return was signed by E. W. Driggers, county judge of Baker county; Andrew Allen, sheriff; and William Green, a justice of the peace. The Republicans claimed that the Driggers return was "more regular on its face," the "most regular under the law," as General Wallace expressed it in his evidence, and upon this one ground they justified its use rather than the other. Was this

[18] Ho. Miscl. Doc. No. 31, pt. 2, pp. 103, 104, 514, 515: 45 Cong., 3rd sess.

[19] Ib. 105.

[20] Ib. 104.

contention well founded? In fact, had this claim any justification whatever?

The law creating the county canvassing board and defining its duties is found in section 24 of the act approved August 6, 1868. The amendment of the law passed in 1872 did not change or attempt to change this statute of 1868 in respect to the *county* canvassing board. So the law under which the county boards made the returns of the election of 1876 required that "on the sixth day after any election or sooner if the returns shall have been received," the county judge and the clerk of the *circuit court* shall meet at the *office of the circuit clerk,* take to their assistance a justice of the peace, and "publicly canvass the votes" "as shown by the returns on file in the office of such clerk or judge." The preceding section of this act requires the inspectors and clerk of the election at the several polling places in each county, the polls having been closed, to canvass the votes, and make and sign duplicate certificates showing the result. One of these, "without delay, securely sealed," must "be delivered to the clerk of the circuit court, and the other to the county judge of the county." Hence, the county board was authorized to canvass "the returns on file in the office of such clerk or judge," as they preferred.[21]

Now the only question as between the Driggers and the Coxe returns was as to which was the more regular in its signatures. Driggers was the county judge; he had in his possession one of the duplicate certificates, and was one of the men authorized by the law to make the county canvass. Coxe was clerk of the circuit; he had in his possession the other certificate, and was also

[21] Laws of 1868, p. 7.

one of the men authorized to make the canvass. Each had associated with him in what he claimed to be a correct and authentic canvass, a justice of the peace, another officer also authorized to assist in the canvass. Thus far the certificate of neither had any advantage.

The third signature on the Driggers return was that of the sheriff. The law provided that the sheriff should act on the board only in case of the "absence, sickness, or other disability of the county judge or clerk." Nothing on or about the Driggers return indicated the absence, sickness, or other disability of the clerk; but right by the side of the Driggers paper lay two other documents, one of which bore the same date as that of the Driggers return, signed by the clerk, *prima facie* evidence that the absence of the clerk's signature from the Driggers paper was not the result of disability on his part. No *prima facie* ground was shown, and in fact no ground existed, which either justified or excused the action of the sheriff in the canvass, and which gave his signature any authority. The paper made no effort whatever to show why the sheriff had acted, or to justify his signature along with the others.[22] On the face of the paper the sheriff's signature gave it no more weight or validity than would have been given had any other person signed, being a non-member of the board. As to the parties authenticating the instruments there was nothing which rendered the Driggers paper any more in conformity with the law than was either of the others.

The Coxe report had, however, important *prima facie* evidence in its favor. The county board of canvassers was required by the law to make duplicates of their

[22] Ho. Miscl. Doc. 31, pt. 2, 105, 106: 45 Cong., 3rd sess.

report, one of which must be "immediately transmitted by *mail* to the secretary of State, and the other to the governor of the State."[23] Both of the Coxe returns reached the secretary of State, as he frankly admitted, in due course of mail; *but the Driggers return did not so reach him.* Before a subsequent investigating committee McLin stated on oath that this Driggers report which he read and which he at first presented as the true and only return from Baker county, was handed to him by Governor Stearns in person.[24] Governor Stearns had no authority whatever for such action—he never claimed any; when the act was done it was supposed that the fact would never reach the public. But McLin knew the truth at the time he presented the Driggers report to the board; and both he and Stearns knew the contents, knew that it omitted two of the four precincts of the county. Upon the face of the papers the board had notice that the one paper had reached the secretary as required by law and that the other had not. Being *prima facie* equal in other respects, nothing short of a deliberate purpose to mislead the public as to the true showing on the face of the returns, could have induced sensible men to use a paper received through an illegal channel as against two others, upon their face regular and of equal dignity of authentication, received in the legal way and which upon their face showed the total vote of the county.

Therefore, the Coxe returns were the more regular under the law, and undoubtedly should have been taken rather than the Driggers report in finding the result of all the returns upon their face. This done, the

[23] Laws of 1868, p. 7.

[24] Ho. Miscl. Doc. 31, 122, 123.

Tilden electors have a larger majority than that claimed for Hayes by the use of the Driggers figures. It is entirely untrue, therefore, that, when "the secretary of State of the State of Florida laid before the canvassing board the returns of the votes for electors from all the counties of the State," a "count of the gross vote, before any canvass was made by the board, before any vote was rejected or any correction was made," showed "that the Hayes electors had 43 majority over the Tilden electors," as Commissioner Garfield claimed for the returns upon their face.[25] He had the minutes of the board before him, and he must have known that this claim for Hayes was possible only by *rejecting* the Coxe returns from Baker county; he must have known that this conclusion was possible only by refusing to consider all the returns that were actually before the board,—a result based upon a document which had no *prima facie* support, and that had come to the board through the illegal collusion of the governor and the secretary of State.

The question which the Coxe and the Driggers returns presented, was the single instance within the jurisdiction of the board where evidence was necessary or properly receivable to determine which was the true return and should be counted. Comparing the two certificates with the precinct returns in order to determine the vote that had actually been cast, the board saw at once that the Coxe return corresponded exactly with the returns on file in the clerk's office. The Republicans themselves did not question in this canvass the genuineness and authenticity of the Baker county precinct returns; and no evidence could be

[25] Proceedings, 959.

found to support the Driggers paper. It was shown before the State board that when the Coxe canvass of the 13th was made, Driggers had been summoned by the clerk to appear at his office for the purpose of canvassing the precinct returns. When the canvass dated on the 10th was made by Coxe and Dorman, Driggers had merely been verbally requested to appear at that time and participate in the canvass; but as he did not appear Coxe feared that the verbal summons might be held insufficient, and therefore he served a written summons requesting Driggers to appear at the clerk's office for the purpose of participating in the canvass made on that day. But Driggers had entered into collusion with leading Republicans of Florida to falsify the Baker county vote that there might be made a *prima facie* case upon the face of the returns for Hayes. For that reason alone Driggers wilfully refused to participate in either canvass made by the clerk and a justice.

Governor Stearns co-operated to bring about the Driggers fraud. On the 10th, Dorman, who canvassed with Coxe, was the only justice in the county. The conspirators needed a new justice; Driggers went to Stearns with the plan, told him why he wanted another justice, and forthwith one Green was commissioned.[26] Stearns having issued the commission, Driggers sent it to Green and summoned him to appear at the county seat on the 13th. Instead of joining Coxe, as he had been requested to do,[27] Driggers and Green went to the clerk's office "at very nearly night, if not quite," "about dark," Driggers himself on oath tells us;

[26] House Miscl. Doc. 31, pt. 2, 33: 45 Cong., 3rd sess.

[27] Ib. 36; Ho. Rept. 611, 240.

and the two were let into the clerk's office by a deputy clerk. Without an effort to have Clerk Coxe present, Driggers and the new justice and the sheriff looked over the returns and then "went over to Mr. Canova's and sifted them out."[28]

Why "sift them out?" No one, not even a Republican, has ever claimed authority or jurisdiction for such work as thus done by these conspirators under cover of night, yet their lame excuse is a matter of some curiosity. They admitted that they found "the precinct returns all right;" that all the formalities of the law had been fully complied with as to all returns from each precinct in the county. They had no evidence before them, not even so much as an affidavit; they had nothing from which to make a certificate except the precinct returns. Of the four precincts in the county, two were entirely left out: Darbyville and Johnsville. At the latter place Tilden had been given 84 votes and Hayes 1. Driggers stated on oath that he left out this precinct *on the ground of intimidation* at the election. When asked what intimidation, he replied, "They refused a man his vote there." Surprised, his interrogator quickly inquired, "They refused one man his vote there?" "Yes, sir," the witness meekly replied, and then frankly admitted that the only evidence he had of what he claimed to be intimidation was that the man himself had told him, "a day or two after the election; probably the day of the election. I cannot say when."[29] He said he had discarded the entire vote given at Darbyville, where the Democrats also had a heavy majority, because he

[28] Doc. 31, pp. 34, 35.
[29] Ib. 44.

had seen some illegal votes cast; at first he put the number at five, then qualified it to "some three or four, two or three, or something." No other reason whatever was claimed for discarding either precinct.[30] In fact the sheriff on oath admitted that they "just heard it rumored around" that there was intimidation at the Johnsville precinct, adding, "we had no evidence before us at the time" of the attempted certification.[31]

Upon this farcical ground the certificate was built to meet Republican needs, then someone furnished the arch traitor a railroad ticket to carry the pseudo-returns to Governor Stearns, whereas the law required returns from the county canvassers to go *by mail* to the secretary of State. Martin, the chairman of the Republican State committee, gave him at least $20.00; and Canova, at whose house the returns were "sifted," added not less than $15.00. Whether Driggers got more for the foul deed, he was not able, when on oath, to recall; though he qualified himself by saying, "I suppose I might have got more than $35.00!" [32]

It is, therefore, not strange that *on the canvass* the Republicans admitted the Coxe returns, counting the votes as certified therein rather than as returned by Driggers. However, when we recall the part taken by the governor, that both Driggers and Sheriff Allen, who acted in the fraudulent canvass with him, were appointees of Stearns,[33] the funds furnished by the chairman of the Republican State committee, and the tenacity with which McLin clung to the fraudulent document, well knowing the source and contents as he did

[30] Ib. 45.
[31] Ho. Miscl. Doc. No. 35, pt. 11, 284: 44 Cong., 2d sess.
[32] Doc. 31, p. 48.
[33] Ho. Miscl. Doc. No. 35, 294, 297: 44 Cong., 2nd sess.

of both it and the Coxe returns; and the adroit dissimulation with which Chandler endeavored to hide from the board and the public the Coxe returns, we realize something of the guilt of the Hayes party leaders, both State and National. But in atoning for this glaring sin against law, morals, party, State, and Nation, the State had been given to Tilden as no one disputed;[34] and so the State board sought an avenue of escape down which they could cover their tracks with better success at least so far as the immediate public view was concerned. This the Republican members found by going not alone behind the returns before them, but by passing also behind the precincts returns as they lay accompanied by the ballots that actually had been cast, in the several clerk's offices of the State; and upon *ex parte* affidavits, made in many instances by negroes who could neither read nor write, by rejecting votes cast for the Tilden men. Some shadow of an excuse back of the precinct returns had to be found, because when the returns made by the county canvassers had been verified by comparing them with the precinct returns, the board found that upon all the returns from all sources, the Tilden electors were shown to be elected.

The canvass over, General Francis C. Barlow, pronounced by Marble as "the foremost counsel and the ablest disputant on the Republican side," returned home and reported to President Grant that Tilden had a majority of the popular votes of Florida, and that the minutes of the canvassing board showed this fact.[35] But Barlow was too honest for the partizanship

[34] Doc. 31, 515.
[35] Sen. Rep. 611, 13.

that dominated the Republican cause. Carl Schurz, Hayes' Secretary of the Interior, testifies that, this admission and manly stand being the occasion, the general was "flouted and ostracised by his associates for manifesting an open mind and a judicial spirit." [36] Barlow's fate, too, must have weighed heavily with the Republicans of the Commission, no doubt greatly influencing such of them as Judge Bradley, who admits: "The question was one of grave importance, and, to me, of much difficulty and embarrassment;" and that up to the decision he was "sometimes inclined to the one view and sometimes to the other." [37]

As we saw in the review of the *quo warranto* and the *mandamus* proceedings, the elimination of votes actually cast, and which was necessary to reach a pro-Hayes result, was illegal and the result thus reached a nullity, yet were it not, no impartial and judicial mind can read the affidavits upon which this action professed to rest, and see other than that it lacked every justification and excuse. That the succession to the Presidency of the United States of America could be controlled by *ex parte* affidavits, without opportunity to cross-examine the witnesses, prepared by partizans, no matter to which party belonging, without the restraining influence of a court, considered without opportunity to furnish proper counter evidence and with no power to compel testimony, all of which was true as to the Florida State canvassing board,—furnishes a proposition to which I believe no true patriot in his sober moments will subscribe.

[36] Reminiscences, 372.

[37] Miscellaneous Writings, 221.

X.

After the Battle.

"THE Constitution, instead of being defended, had been shot to death on the battlefield," wrote J. S. Black, of counsel for the Tilden supporters, discussing the action of the majority of the Commission, in the *North American Review*, July-August, 1877. So far as the majority seem to have felt any force from the laws of Florida as authorized by the Constitution, Blacks' figure is expressive of the fearful truth. The preservation of the rights of the States and of popular liberty is as essential to the preservation of the true American government, as is a due reverence for Federal authority, considered in its national sphere only, as Black pointed out in his review of the decision.[1] The decision has in it all the elements of practical injustice to the constitutional method of selecting the President; more, it cannot be reconciled with the true spirit of government as Americans understand and mean to preserve it. If the blended voice of the letter and spirit of a written constitution and laws with that of the people's elective sovereigns, is not to prevail, where shall we look for public peace and the security of private rights?

Judge Bradley answered Black's analysis of the decision, saying: "If a court of last resort decides a controversy the decision stands. If an election is held and decided according to law, there is an end of the

[1] The Electoral Conspiracy, Ib. 4.

matter."[2] True, retorted the Democrats, but the decision of the election of the Hayes electors was not "according to law;" because, they reiterated, the Florida court of last resort plainly decided in the *mandamus* that the State canvassing board did not have the power that it exercised in reaching the pro-Hayes report, and that that report was *not according to law.* That *construction should have been an end of the matter;* that decision should have stood; it should have been followed implicitly by the Commission in determining the powers conferred upon the State board by the law of Florida.

However, while the lawyers re-argued the legal questions, the Democrats in Congress sought to avert the impending injustice. An opportunity for the effort was furnished by the law which created the Commission. That law provided that when the decision had been put into writing and signed by the members agreeing therein, the two Houses should again meet, "and such decision shall be read and entered in the journal of each House, and the counting of the votes shall proceed in conformity therewith, unless, upon objection made thereto in writing by at least five Senators and five members of the House of Representatives, the two Houses shall separately concur in ordering otherwise, in which case such concurrent order shall govern." So when, February 12, the decision of the Commission had been read in the joint-meeting, David Dudley Field of New York presented an objection signed by five Senators and twelve Representatives. At some length the objection set out various grounds why the decision should not be approved,

[2] Miscl. Writings, 218.

among them that the Commission erred in refusing to receive competent evidence to show who had been appointed and tending to show that the Stearns certificate had been given in pursuance of a fraudulent and corrupt conspiracy, and because the decision refused to consider the evidence that had been gathered by the committees sent out by Congress, and because of the refusal to consider what is known as the subsequent acts of the State, including the judicial proceedings. Having been read, the two Houses pursuant to the terms of the law separated to consider this objection. By a vote of 44 to 25 the decision was approved and made the judgment of the Senate.[3] The House by a vote of 168 to 103 rejected the decision, declaring that the votes cast by the Tilden electors be counted as the votes of the State of Florida. The two Houses not concurring in ordering otherwise, the four electoral votes of Florida were counted for Hayes—and on Sunday, March 4, he took the oath of office; or probably on Saturday night previous, Chief Justice Waite administering the obligation in the presence of Grant and Fish.[4] Of the whole votes of the American people the vast majority supported Tilden; of the people of Florida a majority supported Tilden; of the 340 members of Congress voting, a majority of 84 supported Tilden, declaring him to have been fairly and legally elected. Yet Hayes was declared President; Hayes was inducted into the office and publicly inaugurated, and Hayes accepted.

No true American heard the result with indifference.

[3] Proceedings, 202, 203.

[4] See Rhodes, vol. 7, 279, citing the New York *Tribune* and Boston *Advertiser*.

Black, writing in the July-August *North American Review,* says the Democrats were "transformed with passionate indignation," believing the successful "manoeuvers" to have been "incompatible with honesty and law. * * * All that once ennobled the Nation seemed to be buried in the deep grave dug by the returning-board and filled up by the Electoral Commission." While some allowance should perhaps be made for Black, since as one of the attorneys for the Democrats he must have felt the sting of defeat very keenly, yet the picture is not overdrawn in its essentials. Formerly Attorney-General of the United States, having occupied other important positions, a man of integrity, Judge Black stands unimpeachable as a faithful chronicler.

On the other hand, Black's picture of the elation evinced by Republicans undoubtedly correctly portrays the bulk of the party. He says: "Some misgivings there may have been here and there; but nearly all zealous Republicans saw it with unreserved approbation. * * * The decision was hailed by Christian statesmen with loud benedictions. On Sunday, the fourth of March, pious Republicans assembled themselves together in prayer-meetings, and simultaneously sent up to Heaven the most fervent petitions that God would bless the returning-boards and the Electoral Commission, sanctify the work of their hands, and prosper the pseudo President whom they placed in power. Elsewhere the party demonstrated its pleasure by firing off a large number of great guns. In some places the admiring people gathered in gay and festive crowds, and drank deep potations to the defeat of Tilden's big majority, while Bradley and Kellogg, Chandler

and Packard, Wells, Anderson, and the two mulattoes, were 'in their flowing cups freshly remembered.'"

Yet, there is much truth, as said in *The Atlantic Monthly,* that "a large part of the Republican party accepted its success with profound disgust at the methods by which it had been secured."[5] At the same time it is just to no small number of that party to say that, whatever they thought of the unblushing frauds by their leaders in Florida and of the crimes of the party in Louisiana, they were brought to believe that the forms of law had been met, that whatever wrongs had been done lay in a wrong use of discretion, rested in an illogical or perhaps knowing misuse of the right of determination, lay in an abuse of power, rather than in the usurpation of power; and that the pro-Hayes result was not brought about by acts *ultra vires.* In both parties many had to accept the reasoning of somebody other than themselves. Unskilled in the law; imperfectly acquainted with the real nature of the relation of the States to the Federal government; particularly in the North Hamiltonian largely in the light they did enjoy; the great war between the States freshly remembered, its smoke of battle yet slowly lifting,—since they must follow, it was but natural that partizan Republicans follow such men as Stoughton and Bradley. So when the former, flaunting Black with ill temper from the effects of defeat, in his reply in the same journal in September, 1877, again declared, "a majority of the electors regularly returned in pursuance of the laws of the several States were Republicans,"[6] it was but natural sight

[5] Vol. 47, 392.

[6] North American Review, September-October, 1877, 197.

should be lost by the bulk of the party of the fact that he meant *in pursuance of the laws* of the several States, as Republicans and the Commission as opposed at least to the disputed States themselves, had interpreted and enforced the law; and quite as natural they should not see that that assumption of the right of construction, especially when exercised so as to produce a result at entire variance with the construction by the lawful powers and proper tribunals of the State, was the most radical subversion of both natural and political rights, as the latter stand defined by our Constitution and the common law which it preserves to the States, both defining the American government.

Nevertheless, history must hold the Republican party to a strict account. The leaders of the party, together with Mr. Hayes, accepted the high trust with unblushing eagerness; and the President himself made haste to divide the booty. With a devotion that would have been commendable in a worthier cause, he rewarded those who had been most useful in obtaining the office. McCrary, who fought with almost superhuman energy both in the House and in committee until the Electoral bill passed in triumph, was made Secretary of War; Evarts, the only attorney on either side who clung to his master's cause to the close of the fight before the Commission, was made Secretary of State. General Lew Wallace, among the first and of the rear guard upon the bitterly contested Florida field, was sent abroad; there, thanks to the god of good literature, he gathered material for that splended classic, Ben-Hur. Carl Schurz became Secretary of the Interior, and the control of the Treasury was consigned to John Sherman of Ohio. Within a few months

after his inauguration every one who had helped to secure the needed electoral votes, was placed in a Federal office. This fact is one reason why friends of Tilden and other prominent Americans believe that the Presidency was purchased for Hayes—if not by his direct consent, at least that he assented and paid the price.[7] He certainly kept faith in the contract made by his personal friends and by party leaders to the effect that the army should be withdrawn from the South. These assurances were made to prominent Southern Congressmen after the decision of the Commission in the Florida Case and before the conclusion of the work of the Commission, with a view to secure peaceable aquiescense in the result of the determination.[8] Accordingly, shortly after the inauguration, Hayes withdrew the army from its guard over Republican interests in the Southern States. D. M. Key of Tennessee, an ex-Confederate soldier and said to be a Democrat,[9] was appointed Postmaster General. With Charles Devens of Massachusetts as Attorney-General, and R. W. Thompson of Indiana as Secretary of the Navy, the Grant ring that so sorely despoiled the country, disappeared. Out of the evil some good portended, softening the harshness of the bitter defeat.

The policy of the President in its bearing upon affairs especially concerning the South, was doubtless as much to save his party as to pay campaign debts. Military peonage and carpet-bag rule in the South had

[7] Bigelow, Life of Tilden; Peck, Twenty Years of the Republic, 119; 47 The Atlantic Monthly, 197; The North American Review, July-August, 1877. See also Manton Marble, A Secret Chapter of Pol. Hist.

[8] Ho. Miscl. Doc. No. 31, 42, 624: 45 Cong., 3rd sess.

[9] 44 The Atlantic Monthly, 192.

near proven the ruin of even the National Republican party; and the revolution in public sentiment had set toward a saner policy during the latter part of Grant's administration. Hayes found the time for return to government under the principles of the Constitution so demanding that he dared not follow the footsteps of Grant. Some of the links of usurped control, smeared and daubed with innocent blood chargeable to the atrocious carpet-bag rule, had rusted; and, those of the North who had been forging the chain having become nerveless of nausea, the shackles were beginning to fall away of their own weight.

As time went on calumniations of Tilden and of the Democratic party sought to divert attention from the ugly record of the successful party. But the Democrats in Congress proved fully equal to the situation, and through their committees kept gathering a store of invaluable material bearing upon the conduct of the contest with reference both to Florida and other Southern States. To the evidence gathered by the committees of the House pursuant to the authority of their appointment on December 4, 1876, directing an investigation of the recent election and the action of the State canvassing boards in the disputed States and that the committee "report all facts essential to an honest return of the votes received by electors" and "to a fair understanding thereof by the people;" [10] and to the evidence gathered by the Senate committee of three Republicans and one Democrat,[11] appointed December 6, 1876, with latitudinous powers,—

[10] Report on Florida, January 31, 1877, House Report 143: 44 Cong., 2nd sess.; the evidence gathered by this committee is in House Miscl. Doc. No. 35: 44 Cong., 2d sess.

[11] This is Senate Miscl. Report No. 611.

all of which evidence was at the service of the Commission, the House added down to 1880 in an effort to furnish the world the truth.

Among the most important facts that were fully discovered by these later efforts of Congress are those concerning attempts at bribery in the disputed Southern States. Of no inconsiderable importance is the preservation of the fact that Hayes (though some writers forget to mention the fact)[12] "unfortunately had some superserviceable friends who entered into negotiations, looking to the bribery of one or more members of the canvassing" board of at least Florida. While "dispatches savouring of corruption were sent in cipher to Colonel W. T. Pelton, Tilden's nephew," with which it is now universally admitted Tilden had nothing to do and concerning which his course "was really above reproach," yet the complement of the story as correctly preserved by the exhaustive researches of the Congressional committees, is that the Democratic party was not behind Pelton or cognizant of his efforts either as to Florida or any other State. He and Manton Marble exchanged some telegrams while the latter was in Florida during the canvass by the board, in which Marble transmitted a proposition that had come to him purporting to be an offer by the Republican members of the board to sell out. Under oath Marble afterwards stated that he sent the message as a matter of information, without intent or purpose of attempting either as an individual or as a representative of his party the bribery of the board, that it might be known that the venality of the board was a matter of common

[12] Rhodes, 7 History of the United States, 244.

rumor;[13] and his statement that he had no plan or arrangement with any one to bribe or attempt to bribe or in any way improperly to influence any one whomsoever, and that he declined to buy the board, has not been discredited. It is certain that neither of these men had any official connection with the Democratic party, except that Pelton was voluntarily acting in the capacity of secretary of the National committee. Neither had been commissioned by the party organization, or by any member of the party committee, or by Tilden or any person or persons. Marble went to Florida entirely at his own instance. No one connected with the party management, except Cooper, treasurer of the National Democratic campaign committee, and Tilden, knew until after the time had passed and the matter had been made public, of Pelton's dream or of Marble's information. Both Tilden and Cooper promptly vetoed any effort to use corrupt means; and the moment the matter came to Tilden's ears he promptly stopped all further inquiries which even sought to ascertain whether the officials of the disputed States could be corrupted. The stand taken by Tilden and Cooper was that of high-toned gentlemen who acted upon moral grounds, testified Pelton.[14] The whole matter, when the truth was known, was but a straw of no party significance.

Out of about 30,000 "political" telegrams, of which perhaps over 300 were in cipher, that had been transmitted by both parties through The Western Union Telegraph Companies during the election period, a few, including Marble's in cipher, were given to the New

[13] Ho. Miscl. Doc. No. 31, 259: 45 Cong., 2nd sess.

[14] Ib. Cipher Evidence, 156, 158, 166, 201, 206, 221.

York *Tribune*. It employed an expert who attempted to decipher the ciphers, and the translations as published did much to alienate allegiance to the Tilden cause. Conscious of innocence so far as the party or party leaders were concerned, the Democrats of the House as late as January 21, 1879, appropriated $10,000 of the House contingent fund,[15] and directed that the Florida investigation committee go to the bottom of all alleged efforts at corruption, especially with reference to the State canvassing board in any disputed State. The result, completely vindicating Tilden and the Democratic party, has preserved for the world the incriminating evidence against the Republicans.

Offers of reward and assurances of protection reached the Florida State canvassing board from leaders of the Republican party and from men who were commissioned by the party's official organization, and from men who were Hayes' personal counsel or personal friends, and whose promises he undoubtedly recognized.

Thomas J. Brady, Grant's Second Assistant Postmaster General, at Grant's request conveyed by Zach Chandler, the Secretary of the Interior and also chairman of the National Republican campaign committee, went to Florida to see the count by the State board, and to assist the Republicans in their case. He spent about a month's time there, during which he received his pay as a Federal officer. On oath he stated that the witnesses whose affidavits were used before the board by the Republicans, were promised by him that the Republican party of the United States and the

[15] Ib. 3.

authorities at Washington "would stand by them." He advanced the money, not less than a thousand dollars, and paid the hotel bills "of all the party who went down there." He also carried $2,000 to W. E. Chandler, an officer of the National party organization, also watching the Florida board, who paid the witnesses used by the Republicans; and again out of his own funds Brady bought tickets for the return home of some of the Republican "statesmen."[16] In so far as the legitimate expenses of conducting the contest before the board are concerned, the expenditure is no reflection; that the time of high officials should be taken at the expense of the government for purely partizan purposes, and that the members of the board should be influenced by these and other equally prominent men through promises of reward,—the latter were actually fulfilled after the inauguration,—constitute the venal nature of the transaction. The Democrats also paid their expenses of the local contest. Before the later investigations of the Congressional committee, Cooper, treasurer, filed an itemized statement of the expenditures by the National Democratic committee from November 7, 1876, to February 5, 1879, showing that, including all the Florida expenses, but $15,340.35 had been spent.[17] Pelton stated under oath that at no time had he any money either actually or promised or within reach for political or campaign purposes; and the Republicans were never able to contradict the sworn statements of Pelton, Cooper and Marble that no money was used for improper purposes in Florida. When asked the nature of the work of the visiting Democrats

[16] Ib. 55, 56, 57, 59.

[17] Ib. 157.

before the State board, Marble, on cross-examination, replied: "We endeavored to establish the facts before them and to establish the law. We did everything, in short, except the one thing needful. They were for sale; we refrained from buying them." [18]

Among the many evidences of the corrupting and demoralizing nature of the work of the Republicans in its influence upon the canvassing board, none is more reliable or stronger than the evidence of Samuel B. McLin. Custodian of the returns, no one did more to make it possible for the Republicans to claim Florida than did Secretary of State McLin. Neither he nor Cowgill of the State canvassing board had been forgotten by Hayes. April 15, 1877, McLin was appointed associate justice of the supreme court of the Territory of New Mexico. The Senate delayed to confirm the appointment; McLin fell ill of fatal tuberculosis.[19] Recognizing his serious condition and undoubtedly in view of an early death, "impelled," he declared, "by a sense of duty to myself and justice to others," on March 23, 1878, he wrote and signed the statement from which I have here and there quoted. On June 8 he appeared before the sub-committee composed of Hunton, Springer and Hiscock, and voluntarily filed his statement under oath.

"At no time," he proceeds to say concerning his work in the Florida canvass, "did I feel that I occupied the position of a judge charged with the duty of a strict and nice weighing and balancing of all the evidence presented. * * * I had been for many years and was at the time of the canvass a very active partizan.

[18] Ib. 206, 223.

[19] 26 The Nation, May 2, 1878, 286.

* * * I was shown numerous telegrams * * * from those to whom I had been accustomed to defer. * * * These telegrams also gave assurance of the forthcoming of money and troops if necessary in securing the victory for Mr. Hayes. Following these telegrams trusted Northern Republicans, party leaders and personal friends of Mr. Hayes, arrived in Florida as rapidly as the railroads could bring them. I was surrounded by these men, who were ardent Republicans, and especially by friends of Governor Hayes. * * * I cannot say how far my action may have been influenced by the intense excitement that prevailed around me, or how far my partizan zeal may have led me into error—neither can I say how far my course was influenced by the promises made by Governor Noyes, that if Mr. Hayes became President, I should be rewarded. Certainly these influences must have had strong control over my judgment and action."

Then, referring to subsequent confessions by election officers that an aggregate of 393 votes had been fraudulently added to the Republican vote and counted for Hayes, and that this count had been taken by the State board, McLin adds: "The conclusion, therefore, is irresistible that Mr. Tilden was entitled to the electoral vote of Florida, and not Mr. Hayes." [20]

In answer to questions propounded by the committee, McLin said: "General Wallace told me on several occasions that if Mr. Hayes should be elected that the members of the returning board should be taken care of, and no doubt about that."

In view of the fact that General Wallace had gone to Florida at the request of both Hayes and the chair-

[20] Ho. Miscl. Doc. No. 31, pt. 2, 98, 99: 45 Cong., 3d sess.

man of the National Republican committee, his reply to this grave charge becomes doubly important. It will be remembered that he visited Florida twice, and was present at both counts and canvasses made by the pro-Hayes board. Having appeared before the committee, his attention was called to McLin's statements. He said:

"When I arrived in Florida the second time I did tell Mr. McLin, I am satisfied, that I was there by request of Governor Hayes;" then he denies that he had made similar statements the first time, saying McLin had confused the two visits. His attention called to the statement that he had before the State canvass told McLin that Hayes, if elected, would provide for the Republicans of Florida, General Wallace replied:

"Well, I will tell you the circumstances and you may draw what inference you please from it. I will tell you what occurred, and I will use almost the identical language that I used on that occasion, because I was very much impressed at the time, and I remember vividly the circumstances.

"I was at Mr. McLin's house, and my recollection is that I was there by his invitation. It was probably an evening or two before the board were to pronounce their judgment. In the parlor of his house, after some general conversation, he made to me a remark to this effect: That Mr. Manton Marble had been at his house to see him but a very short time before that and had had a conversation with him, and that in that conversation Mr. Marble had told him that there was no reason or necessity for him, McLin, living or dying a poor man; that if Mr. Tilden were counted in he should command anything he wanted. I

immediately made reply to that. I said, 'Mr. Marble is very bold in his proposition, Mr. McLin, and he certainly forgets that if Mr. Hayes should be elected he will have the same opportunity to take care of his friends,' and I immediately added, 'and I do not doubt that he will do it.' I did not understand at the time that it was a proposal or a proposition on my part to McLin. I did not understand that it was a corrupt proposal from me or anything that looked that way."

After a vain attempt to explain the difference between his proposition and what he represented Marble to have made, the witness was asked by Mr. Hunton: "Mr. McLin was asked: 'Did Mr. Wallace frequently refer to the fact that those who were instrumental in bringing about this result would be rewarded by Governor Hayes when he became President?' and he answered: 'Yes, when we would talk together we would refer to the matter.'" General Wallace replied: "I think that is true if it applies to anything that I said after I returned to Florida the second time." [21]

Undoubtedly, the impartial must admit, a startling confession, and in the main a strong corroboration of McLin! These conversations, more than savouring of attempted bribery or of an effort corruptly to influence members of the Florida State board, undoubtedly besmirched the Republican course before it was supposed the matter of the Florida State canvass had passed from the control of the State board, and under their influence the second canvass of the board was made, resulting in a reiteration of the former pro-Hayes determination,—notwithstanding this last pretended canvass stultified itself by declaring

[21] Ib. 513, 514.

that the vote for State officers, practically the same as that for Presidential electors, showed the election of the Democrats. This second count made during Wallace's second visit, was made by order of the supreme court on the *mandamus*. The Republicans regarded it as highly important again to obtain a pro-Hayes declaration, for Generals Wallace and Barlow, as counsel by specific commission for Hayes and the Republican party, argued the case; and Sellers of New York and possibly Biddle of Philadelphia represented the Democrats in the arguments.[22] Bribery either by the use of money or by promises of valuable public offices, that the assurance might be made doubly sure of obtaining a favorable result upon the canvass pursuant to the *mandamus*, can in no possibility be less criminal or less derogatory than a similar course at any stage of the great controversy. Not only was it not known what weight at the Federal count might be attached to the result should this same board on this second canvass, apply to the count of electoral votes the same law as it must pursuant to the *mandamus* apply to the count of the votes cast for State officers, but the moral influence upon the Republican cause was a question of great consideration. Republicans in Congress, Republicans on investigating committees, and Republican papers made immense use of this second reiteration by the State board; and the fact that the pro-Hayes claim had been repeated by the board became a factor of no little importance in holding together Republican forces.

Therefore we do not wonder that such men as McCulloch, Secretary of the United States Treasury in the

[22] Ib. 516.

administrations of Lincoln, Johnson, and Arthur, whom Rhodes regards as a calm observer,[23] when summing up the history of the contests in Louisiana and Florida, says: "My opinion at the time was, and still is, that if the distinguished Northern men who visited those States immediately after the election had stayed at home, and there had been no outside pressure upon the returning boards, their certificates would have been in favor of the Democratic electors." This opinion, he adds, was confirmed by the voluntary and unreserved admission, made within the hearing of third parties, by the president of the Union Telegraph Company at the annual meeting of the Union League Club in New York City in 1878, that Hayes was not elected and that the telegrams that passed through the offices of his company established the fact.[24]

The electoral votes of Florida and the other disputed Southern States were necessary to the election of Hayes. The others presented less ground for a pro-Hayes result than did Florida. For instance, in Louisiana the Republicans, aided and abetted by prominent party leaders, by the most glaring forgery, changed the electoral certificate that was sent by messenger to the president of the Senate, and which was used; and there is evidence that this crime and its dangerous and far-reaching weight were known to the president of the Senate and to some of the Republican members of the Commission.[25]

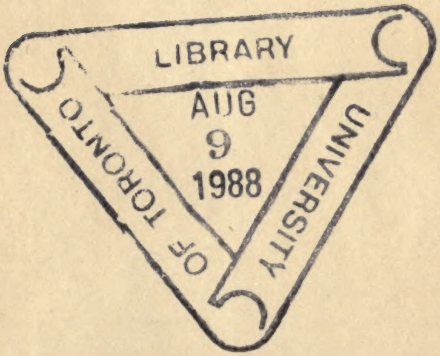
Therefore, since the pro-Hayes certificates, sustained

[23] 7 Hist. U. S., 238.

[24] Men and Measures, 420.

[25] Ho. Rep. No. 140, 56 to 63 and 89 to 91: 45 Cong., 3rd sess.

by the majority decision, rest upon the most disgraceful frauds and acts *ultra vires;* and since this decision of the Electoral Commission, the Florida Case being representative, was without warrant in law or equity, subversive of fundamental principles of our government, and unjustified as an act of revolution,—the conclusion of the impartial historian must be that Rutherford B. Hayes had neither legal nor moral title to the high office of President of the United States.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